85-1671

Supreme Court, U.S.
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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AQUAMARINE OPERATORS, INC.,
Petitioner,

v.

IDA E. DOWNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

THOMAS A. BROWN
BROWN, SIMS, WISE & WHITE
2000 S. Post Oak Blvd.
Twenty-Third Floor
Houston, Texas 77056
(713) 629-1580

Counsel of Record

Of Counsel:

JOSEPH J. FINKEL
BROWN, SIMS, WISE & WHITE

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

1. Whether an award of prejudgment interest is appropriate when a Jones Act claim, joined with a general maritime law claim, is tried to a jury when no basis is provided in its answers to special issues for determining which portion of the damage award is attributable to the respective claims.

2. Whether an award of prejudgment interest is appropriate under the Jones Act and the general maritime law on elements of recovery which have not accrued as of the date of judgment.

3. Whether contributory negligence under the Jones Act and the general maritime law is solely a damage issue, as opposed to an issue of liability, thereby entitling a defaulting maritime litigant to establish such evidence in mitigation of damages.

4. Whether the application of a local rule of procedure, requiring that contributory negligence be affirmatively plead, deprives a defaulting maritime litigant of its federally created substantive right to establish evidence of contributory negligence in mitigation of damages under the Jones Act and the general maritime law.

RULE 28.1 LIST

Petitioner, Aquamarine Operators, Inc., has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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To The Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner, Aquamarine Operators, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 701 S.W.2d 238 (Tex. 1985) and is reprinted in the appendix hereto, p. 1a. The opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas[1] is reported at 689 S.W.2d 472 (Tex. App.—Houston [1st Dist.] 1985), and is reprinted in the appendix hereto, p. 11a.

JURISDICTION

The judgment and opinion of the Supreme Court of Texas was entered on December 4, 1985. That court overruled petitioner's timely motion for rehearing on January 15, 1986 (p. 88a). The jurisdiction of this Honorable Court to review said judgment and opinion is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTORY PROVISION AND PROCEDURAL RULES

The following statutory provision and procedural rules are reproduced verbatim in the appendix hereto, p. 26a-28a.[2]

45 U.S.C. § 53
Fed. R. Civ. P. 8(c)
Tex. R. Civ. P. 94
Tex. R. Civ. P. 243
Tex. R. Civ. P. 373

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1. The intermediate appellate court will hereinafter be referred to as simply the "Court of Appeals."

2. Reference to material contained in the appendix will hereinafter be referred to by the appropriate page number followed by the letter "a".

STATEMENT OF THE CASE

This is a wrongful death action prosecuted by respondent under the Jones Act, 46 U.S.C. § 688, and the general maritime law of the United States arising from the death of her husband.

As a result of discovery sanctions, petitioner's answer (p. 29a) was stricken by the trial court and, consequently, an interlocutory default judgment was entered on all issues of liability. Trial was therefore limited to the issue of unliquidated damages in accordance with Tex. R. Civ. P. 243 (p. 28a).

At the close of respondent's damage evidence, having previously done so in its trial brief (p. 32a), petitioner once again urged its entitlement to mitigate damages by establishing evidence of the decedent's contributory negligence under the Jones Act and the general maritime law. Although it was not required to do so, petitioner tendered a curing instruction in response to the trial court's previously expressed concern that the jury would be unable to differentiate between the issues of liability and damages concerning the decedent's contributory negligence. Nevertheless, the trial court prevented petitioner from establishing such evidence (p. 36a).

The jury returned a verdict in favor of respondent in the amount of $1,500,000.00 (p. 38a-39a). Respondent's motion for judgment requested, *inter alia*, prejudgment interest on the jury's verdict (p. 40a). This request prompted various responses in opposition (p. 43a-59a), and culminated in the award of prejudgment interest on the verdict in the amount of $244,126.00 (p. 24a).

The exclusion of evidence of the decedent's contributory negligence and the award of prejudgment interest, *inter alia*, were again challenged in petitioner's post-trial

motion (p. 67a), which was overruled by the trial court (p. 75a). Consequently, these challenges, *inter alia,* were timely and properly presented to the Court of Appeals (p. 77a) which, in light of the full reversal and remand on two other grounds presented by petitioner, found it unnecessary to address the exclusion of evidence and the award of prejudgment interest.[3]

At this juncture, these challenges momentarily dropped from the forefront of this case,[4] as respondent sought review in the Supreme Court of Texas solely on the basis of the Court of Appeals' rulings.

On December 4, 1985, the Supreme Court of Texas reversed the judgment of the Court of Appeals, overruled petitioner's remaining four points of error which were not addressed by the Court of Appeals,[5] and affirmed the judgment of the trial court (p. 1a). Petitioner timely filed its motion for rehearing urging, *inter alia,* the erroneous exclusion of evidence of the decedent's contributory negligence[6] and award of prejudgment interest. The motion

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3. "In conclusion, we hold the granting of the discovery sanctions constituted both an error at law and an abuse of discretion. Having thus disposed of [petitioner's] first two points, it is unnecessary to discuss the remaining points." *Aquamarine Operators, Inc. v. Downer,* 689 S.W.2d 472, 477 (Tex. App.—Houston [1st Dist.] 1985) (p. 21a).

4. Neither respondent's application for writ of error to the Supreme Court of Texas nor petitioner's response hereto, addresed, nor was required to address, the exclusion of evidence as aforesaid or the award of prejudgment interest.

5. Under Texas law, the Supreme Court of Texas could properly consider these remaining points and had the alternative of either "(1) examining the points not considered by the court of appeals in order to determine whether any will support affirmance of that court's judgment, or (2) remanding the cause to the court of appeals for it to pass on those points." *Roark v. Allen,* 633 S.W.2d 804, 811 (Tex. 1982).

6. In light of the Supreme Court of Texas' application of Tex. R. Civ. P. 94, requiring that contributory negligence be affirmatively plead (p. 27a), petitioner also urged in its motion for rehearing, in

for rehearing was overruled on January 15, 1986 (p. 88a). Petitioner timely filed its motion to stay mandate pending review by this Honorable Court, which stay was granted by the Supreme Court of Texas on January 29, 1986.

REASONS FOR GRANTING THE WRIT

PART I

1. Introduction: Dependent and Inadequate Grounds of Decision

This Honorable Court has historically declined to review judgments of state courts which rest upon independent and adequate nonfederal grounds.[7] The reasons for this refusal are obvious. Indeed, while it is appropriately within the province of each state to prescribe the methods by which the appellate jurisdiction of its courts is invoked, as well as the rules of practice to be applied in the exercise of that jurisdiction, this Honorable Court has consistently stated that the assertion of an issue governed by federal law, when plainly and reasonably made, will not be defeated under the name of local practice.[8]

These seemingly inconsistent, although fundamental, policies have prompted this Honorable Court to articulate various standards for determining the independence and adequacy of an asserted nonfederal ground of decision.

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addition to the issues previously raised, that said application of a local rule of procedure deprived petitioner's assertion of a federally created substantive right (p. 87a, point of error no. 8). This issue has been properly brought forward to this Honorable Court (see p. 26, *infra*).

7. *Murdock v. Memphis*, 87 U.S. (20 Wall.) 420 (1875); *Miller v. Nicholls*, 17 U.S. (4 Wheat.) 311, 315 (1819).

8. *Wright v. Georgia*, 373 U.S. 284, 289 (1963); *Staub v. Baxley*, 355 U.S. 313, 319 (1958); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

These standards, although varied in language and direction, impart essentially one proposition: That the state ground of decision, the application of which rendered unnecessary the consideration of the federal issue, must be independent of said issue, as well as fairly and consistently applied.

The Supreme Court of Texas' rulings[9] fall far short of these standards and, consequently, it is from these rulings that petitioner seeks review.

2. Waiver: Adequacy of Presentation Is Itself A Federal Question

"[T]he question of when and how defaults in compliance with state procedural rules can preclude [this Honorable Court's] consideration of a federal question is itself a federal question," *Henry v. Mississippi*, 379 U.S. 443, 447 (1965),[10] and as such, the adequacy of presentation, the corollary proposition, is similarly a federal question. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938). It is "a question as to which [petitioner is] entitled to invoke [this Honorable Court's] judgment", *Love v. Griffith*, 266 U.S. 34 (1924), and following the exer-

9. "The third point was that the trial court improperly refused to admit evidence of Downer's contributory negligence. Contributory negligence is an affirmative defense which must be plead. Aquamarine's answer had been struck and default judgment rendered as to liability. Thus, defendant had no pleading to support contributory negligence, so the court did not err in refusing to admit the requested evidence."

"Aquamarine's remaining point before the court of appeals was that the trial court erred in awarding prejudgment interest in a Jones Act case tried to a jury. This point was not presented to the trial court and was thus waived." (p. 9a-10a).

10. *See also Staub v. Baxley*, 355 U.S. 313, 318 (1958); *Schuylhill Trust Co. v. Pennsylvania*, 296 U.S. 113, 121 (1935); *First Nat'l Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 346 (1926); *Ward v. Love County*, 253 U.S. 17, 22 (1920); *Carter v. Texas*, 177 U.S. 442, 447 (1900); *Boyd v. Nebraska*, 143 U.S. 135, 180 (1892).

cise of that judgment, there can be but one conclusion: That petitioner adequately, albeit unquestionably, presented the federal issue concerning prejudgment interest to the courts of Texas.[11]

Of primary comfort is this Honorable Court's mandate that its consideration of a federal issue "may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." *NAACP v. Alabama ex. rel. Flowers*, 377 U.S. 288, 297 (1964). Of secondary comfort is the realization that there had been compliance, both in form and substance, with the procedural rules of the State of Texas *in every sense.*

Contrary to the Supreme Court of Texas' dispositive statement aforesaid (*see* note 9, *supra*), petitioner did *not* merely urge to the Court of Appeals "that the trial court erred in awarding prejudgment interest in a Jones Act case tried to a jury." That is a simplified and distorted version of the position which *respondent claimed* was urged by petitioner to the Court of Appeals[12] and, furthermore, merely takes into account only one of respondent's grounds of recovery. Rather, properly relying upon federal precedent,[13] petitioner clearly and succinctly urged to the Court of Appeals that prejudgment interest is not recoverable when a Jones Act claim, joined with a general maritime law claim, is tried to a jury *unless* a

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11. Petitioner concedes that the Supreme Court of Texas' waiver ruling is an "independent" nonfederal ground and, consequently, the discussion herein will be limited to the inadequacy of said ruling.

12. *See* p. 83a, wherein respondent erroneously recites, *inter alia*, that petitioner's "last point of error asserts that prejudgment interest cannot be recovered because this case was tried to a jury". The Supreme Court of Texas simply added the reference to the "Jones Act".

13. *See* authorities cited in note 42, p. 22, *infra*.

basis is provided for determining which portion of the damage award is attributable to the general maritime law claim, for which prejudgment interest is recoverable, as opposed to that portion of the damage award attributable to Jones Act negligence, for which prejudgment interest is not recoverable (p. 80a-81a).

Similarly, and again contrary to respondent's recitations, petitioner did not urge to the trial court "that prejudgment interest was not recoverable [merely] because [respondent] had sued under the Jones Act as well as under the general maritime law." (p. 83a). Although this Honorable Court's jurisdiction to review state court decisions appearing to rest on nonfederal grounds "does not depend on citation to book and verse", *Eddings v. Oklahoma,* 455 U.S. 104, 113 (1982), jurisdiction in this case could be so invoked by virtue of petitioner's citation in the trial court (p. 47a) to the identical authority and argument subsequently urged to the Court of Appeals:

> Defendant would call this Court's attention to the case of *Barton v. Zapata Offshore Company,* 397 F.Supp. 778 (E.D. L.A. 1975) where Judge Reuben [sic], now a member of the Court of Appeals for the Fifth Circuit, clearly and plainly set forth the proposition that when a Plaintiff asserts claims arising under the Jones Act and General Maritime Law, when tried together, the joinder of the Jones Act claim precludes an award of prejudgment interest, absent a completely separate and distinguishable admiralty claim being joined.
>
> In developing the opinion, the Court stated:
>
> > "The first reef the Plaintiff must negotiate is a line of Fifth Circuit jurisprudence holding that *prejudgment interest may not be awarded in Jones Act cases tried to a jury. Barrios v. Louisiana Construction Materials,* 5 Cir. 1972, 465 F.2d 1157; *Sanford Bros. Boats, Inc. v. Vidrine,* 5 Cir. 1969, 412 F.2d 958."

> When addressing the issue of when Jones Act claims and General Maritime Law claims are joined together, the Court stated as follows:
>
> > "In sum, the Plaintiff may not claim the benefits of a jury trial on an unseaworthiness claim completely merged with a Jones Act claim as to quantum and then attempt to unscramble the verdict after he prevails."

Subsequent to the filing of the excerpted document in the trial court, the *Barton* opinion was cited with complete approval and adopted by the Fifth Circuit in *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (5th Cir. 1984),[14] which was strenuously urged by petitioner as controlling in the Court of Appeals (p. 81a).

Yet, in an obvious attempt to avoid the preclusive effect of *Wyatt* and *Barton* on the trial court's erroneous award of prejudgment interest, respondent's counsel created a waiver argument in the Court of Appeals[15] which undoubtedly prompted the Supreme Court of Texas to recognize a distinction between the phrases "in admiralty" and "at law", on the one hand, and the phrases "to a judge" and "to a jury" on the other hand. As respondent's counsel was undoubtedly aware,[16] the phrase "in admiralty" is, *inter alia*, the maritime practitioner's shorthand for a bench trial. Similarly, the phrase "at law" refers, in shorthand form, to an admiralty jury trial. Indeed, the Fifth Circuit uses the phrases interchangeably when referring to the same cases.[17]

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14. *See also Domangue v. Penrod Drilling Co.*, 748 F.2d 999 (5th Cir. 1984).

15. In the trial court, however, respondent merely belittled the *Barton* opinion, being unable to distinguish it on the merits (p. 63a).

16. *See* respondent's brief filed in the Court of Appeals, wherein her counsel recognizes that a "jury trial may be denied when the case is 'in admiralty'. Fed. R. Civ. Proc. 38(e)." The natural consequence of this phrase is that a bench trial results.

17. In *Wyatt*, 735 F.2d at 955, the Court stated that it has "disapproved the award of prejudgment interest in a Jones Act case

The meaning of these phrases, and the admiralty bench and bar's interchangeable use thereof, is blatantly obvious. The obvious notwithstanding, the Supreme Court of Texas fell prey to the semantic manipulations which respondent urged to the Court of Appeals as evidenced by relevant excerpts from her brief (p. 83a-85a). This waiver argument, which misstated, confused and distorted petitioner's trial and appellate challenge, prompted the highest court of the State of Texas, much to petitioner's shame, to conclude that waiver occurred.

Indeed, respondent's reply to petitioner's motion for rehearing, wherein petitioner, *inter alia*, attempted to explain to the Supreme Court of Texas how it had been misguided by respondent's waiver argument as set forth above, all but admitted that neither the trial judge, nor the Supreme Court of Texas, understood, nor was required to understand for that matter, the basic tenet of petitioner's explanation, much less the merits of its argument:

> State trial judges are not experienced admiralty lawyers, well-versed in arcane "admiraltyspeak" where attorneys are called "proctors," a suit is a "libel" and the parties are called "libelants" and libelees."[18] The code words "at law" cannot be expected to immediately invoke the concept of a jury trial in Texas state practice, where actions "at law" and "in equity" have been blended and the concept of a jury trial is constitutionally protected in both.

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tried to a jury" citing *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972) and *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958 (5th Cir. 1969), yet in *Domangue*, 748 F.2d at 1000, it referred to both *Barrios* and *Vidrine* by stating "that prejudgment interest is not available in Jones Act cases *tried at law*." (Emphasis supplied.)

18. Respondent's counsel, in an attempt to further confuse and misguide the Supreme Court of Texas, failed to mention that an admiralty attorney has not been called a "proctor", a suit in admiralty has not been called a "libel", nor parties "libelants" and "libelees", since 1966, when the Federal Rules of Civil Procedure were promulgated.

Far be it from petitioner, as evidenced by the disposition of this entire case, to dispute that the trial judge and the Justices of the Supreme Court of Texas are "not experienced admiralty lawyers, well-versed" in the field of maritime law. Surely, however, the Savings to Suitors clause[19] presupposes that state court jurists who sit in judgment under its authority are at least marginally familiar with the involved subject matter and, if not, will endeavor to become familiar with it. In any event, the failure of the state court system should not befall the maritime litigant nor should it preclude this Honorable Court's review of the prejudgment interest issue.

3. Waiver: Prior Rulings Provide No Fair and Substantial Support

Clear adequacy of presentation notwithstanding, "[s]tate courts may not avoid deciding federal issues by invoking procedural rules that they do not apply even-handedly to all similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982).[20] As established by the cases hereinafter discussed, Texas jurisprudence is replete with opinions evidencing, both directly and indirectly, that the Supreme Court of Texas' waiver ruling is without "fair and substantial support"[21] in its previous decisions.

Preliminarily, petitioner respectfully contends that the cases relied upon by respondent which prompted the waiver ruling do not even arguably apply to this case.[22]

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19. 28 U.S.C.A. § 1333.

20. *See also Barr v. Columbia*, 378 U.S. 146, 149 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964); *Wright v. Georgia*, 373 U.S. 284, 291 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958).

21. *Ward v. Love County*, 253 U.S. 17, 22 (1920).

22. *See* p. 84a, wherein respondent cited the following cases: *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982) (by failing to raise indispensable party issue in the trial court, "defendants could

Indeed, it cannot be disputed that petitioner vigorously opposed respondent's request for (p. 43a-59a), and award of (p. 68a-70a), prejudgment interest. Thus, it cannot be said that petitioner raised a prejudgment interest challenge "for the first time on appeal", having clearly done so in the trial court, such as in the cases upon which respondent relied. Rather, respondent's waiver argument, and the Supreme Court of Texas' misguided reliance thereon, is more subtle. Indeed, conceding that a prejudgment interest challenge was presented at the trial court level, respondent urged that petitioner "is seeking to advance a new complaint or theory of error regarding prejudgment interest" in the Court of Appeals and, consequently, since petitioner is limited on appeal to the theory urged in the

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not be heard to complain for the first time on appeal" and thus the complaint was waived); *Gray-Taylor, Inc. v. Tennessee*, 587 S.W.2d 668, 671 (Tex. 1978) (arguments raised "for the first time" in the Supreme Court of Texas had "not been properly preserved and we therefore cannot consider them", citing *General Electric Credit Corporation v. Smail*, 584 S.W.2d 690, 699, n.17 (Tex. 1979)); *Willis v. Titan Contractors Corp.*, 625 S.W.2d 69, 74 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (holding, *inter alia*, that since the case was plead and tried as a Jones Act case, Plaintiff was precluded on appeal from urging, for the first time, an entitlement to recovery under § 905(b) of the Longeshoreman and Harbor Worker's Compensation Act, citing *State of Cal. Dep't of Mental Hygiene v. Bank of the Southwest Nat'l Ass'n*, 348 S.W.2d 731 (Tex. Civ. App.—Waco 1961), *aff'd*, 354 S.W.2d 576, 581 (1962), for the proposition that a contention not raised in the trial court cannot be raised for the first time on appeal); *Love v. Olguin*, 572 S.W.2d 17, 19 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.) (appellant's motion to dismiss the appeal denied holding, *inter alia*, that the issue of appellee's standing was "raised for the first time on appeal and presents a new theory which was not presented to the trial court"); *Fulcher v. Texas State Bd. of Pub. Accounting*, 571 S.W.2d 366, 370 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (holding, *inter alia*, that where "there is no indication in the record that these specific theories were brought to the attention of or decided by the trial court", the merits of the contentions need not be considered on appeal). These cases clearly involve a complete failure to raise a challenge in the trial court; surely none involved a specific citation to, and quotation from, authority in the trial court which formed the basis of the argument on appeal, such as in the instant case.

trial court, the latter and allegedly different theory is waived. (p. 84a-85a).

The previous decisions of the Supreme Court of Texas addressing this "limitation" waiver principle, as well as the lower appellate court decisions of this State which have been cited with approval by the Supreme Court of Texas for the proposition, clearly demonstrate that applications of this principle were prompted by the presentation of *inconsistent* theories of recovery or defense. Thus unfolds a principle of procedure the application of which, unlike in the instant case, is based upon fairness and substantial justice.

For instance, in the recent case of *TM Productions, Inc. v. Blue Mountain Broadcasting Co.*, 639 S.W.2d 450, 451 (Tex. 1982), the court held that TM was precluded from urging contractual consent to jurisdiction on appeal when the record reflected that it expressly waived this contention at the trial court level, citing *Fulcher v. Texas State Bd. of Pub. Accountancy*, 571 S.W.2d 366 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) in support thereof, a case relied upon by respondent herein.[23]

Similarly, in *Davis v. Campbell*, 572 S.W.2d 660 (Tex. 1978), the Supreme Court of Texas, reciting that the "[p]arties are restricted on appeal to the theory on which the case was tried", reversed the Court of Civil Appeals' second damage offset simply because the jury had already offset this amount in reaching its verdict. Surely, any argument seeking to retain the second offset would be considered inconsistent with the original theory of a specific amount for a single offset. The four decisions[24] relied

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23. *See* brief discussion of *Fulcher* in note 22, *supra*.

24. *State v. J.M. Huber Corp.*, 199 S.W.2d 501, 502 (Tex. 1947) (State was precluded from urging on appeal that it was entitled to a recovery notwithstanding the statute involved therein,

upon by the court in *Davis* further reflect the proper application of the waiver principle at issue herein, as do several lower appellate court opinions[25] which have been previously cited with approval, in dictum, by the Supreme

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when it urged in the trial court that the statute itself determined the obligations of the defendants); *Sorrells v. Coffield*, 187 S.W.2d 980, 981 (Tex. Comm'n App. 1945, opinion adopted) (petitioner's rights on appeal were "measured within the limits which he thus set for himself" and therefore, having tried his case on the theory that he was entitled to become a joint owner of certain land "as and when sufficient mineral interest was sold" by him to reimburse respondent for the price thereof, petitioner was bound by the adverse application of the statute of frauds); *Safety Casualty Co. v. Wright*, 160 S.W.2d 239, 243 (Tex. 1942) (wherein the court, on rehearing, reversed itself, the court of civil appeals and the trial court, concluding that its judgment could not be sustained on the basis of evidence which indicated that the decedent had completed his repairs under a bus, and thus resumed his status as a passenger thereon, when the plaintiffs had plead and tried the case on the theory that the fatal injury occurred when the decedent was under the bus); *Kousal v. Texas Power & Light Co.*, 179 S.W.2d 283, 284 (Tex. Comm'n App. 1944, opinion adopted) (wherein the court, after an exhaustive review of the record, concluded that petitioner was not urging a theory before it which differed from that advanced in the courts below and thereby proceeded to address the merits of petitioner's challenge).

25. *Southwest Title Ins. Co. v. Plemons*, 554 S.W.2d 734, 736 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) (appellant was precluded from urging a hearsay objection on appeal when its trial court objection to the same testimony was that if the other appellees had knowledge of the easement, they "would have told" declarant/appellee, thereby assuming on appeal a position which was inconsistent with the position previously urged); *Krottinger v. Marchand*, 252 S.W.2d 217, 219 (Tex. Civ. App.—Fort Worth 1952, no writ) (assertion of inconsistent theories was prohibited where appellant, as evidenced by its objections to the court's charge, assumed that appellee was injured in an automobile accident, and was therefore precluded from arguing on appeal that the trial court erred in failing to submit an issue inquiring whether or not appellee was actually injured); *Dorsey v. Younger Bros., Inc.*, 216 S.W.2d 294 (Tex. Civ. App.—Galveston 1948, no writ) (appellant was precluded from urging on appeal that the submission of the special issue addressing control rendered improper the submission of the issues on speed and lookout, since appellant urged in the trial court that an irreconcilable conflict existed between the jury's findings as to the issues of speed, lookout and control).

Court of Texas in *Nat'l Lloyds Ins. Co. v. McCasland*, 566 S.W.2d 565 (Tex. 1978).

The unmistakable thread that runs through these cases is the existence of a subsequent assertion of a position which is *inconsistent* with the previously urged position. This particular waiver principle is not new to Texas jurisprudence, as evidenced by the 1922 decision of *Boatner v. Providence-Washington Ins. Co.*, 241 S.W. 136, 140 (Tex. Comm'n App., opinion adopted) and the long line of decisions cited therein.[26]

However, although "[t]he law forbids the assumption of an attitude on appeal inconsistent with that taken at the trial, and on appeal litigants are restricted to the theory upon which the cause was prosecuted or defended in the court below," *Id.*, at 140, this principle should not befall petitioner herein. Indeed, it cannot be disputed that petitioner, throughout the entire course of this litigation, properly *and consistently* urged the identical challenge: That the award of prejudgment interest is inappropriate in this case based upon the applicable principles of maritime jurisprudence which govern the award thereof. There is nothing in the record presently before this Honorable Court to indicate, either expressly or by realistic inference, that petitioner ever urged an *inconsistent* position regarding prejudgment interest and is, in fact, clearly to the contrary.

A further indication that the waiver ruling is an inadequate nonfederal ground of decision is found in the two decisions in which the Supreme Court of Texas has had occasion to discuss waiver in the precise context of a

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26. In *Boatner*, having previously relied upon the validity of an insurance policy in the trial court and the Court of Appeals, the insured was precluded from urging a position which disavowed the validity of the policy.

prejudgment interest challenge,[27] as well as in several decisions addressing Texas Rule of Civil Procedure 373 (p. 28a) which governs, *inter alia*, preservation of error.

Said rule of procedure merely "requires that at the time an order of the court is made or sought, a party should make known to the court the action that he desires the court to take and the grounds therefor." *Hurst v. Sears, Roebuck & Co.*, 647 S.W.2d 249 (Tex. 1983). Hence, a complaint is preserved for appellate review if it identifies the "objectionable matter or event sufficiently for the opposite party to cure any deficiency and for the trial judge to know of the nature of the alleged error. Tex. R. Civ. Pro. 373." *PGP Gas Products, Inc. v. Fariss*, 620 S.W.2d 559, 560 (Tex. 1981). This procedural rule and the decisions cited hereinabove, as well as the lower court decisions which have placed reliance thereon, establish that petitioner did all, albeit more, than was required of it to preserve the error of which it now complains.[28]

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27. *See Westinghouse Credit Corp. v. Kownslar*, 496 S.W.2d 531 (Tex. 1978), wherein the Court held that petitioner's request to increase the prejudgment interest rate from six to ten percent was waived since the record failed to reflect "that [petitioner] ever specifically requested such relief before the trial court," *Id.*, at 533. In support of this ruling, the Court cited its earlier decision in *Plasky v. Gulf Ins. Co.*, 335 S.W.2d 581 (Tex. 1960), wherein it overruled, *inter alia*, petitioner's request for prejudgment interest since he "did not object or except to the judgment entered," nor did the record reflect that the request "was ever urged in the trial court", citing Texas Rule of Civil Procedure 373 (p. 28a) to support its holding.

28. *See Foshee v. Republic Nat'l Bank of Dallas*, 600 S.W.2d 358, 364 (Tex. Civ. App.—Tyler 1980), *rev'd on other grounds*, 617 S.W.2d 675 (Tex. 1981); *McLemore v. Johnston*, 585 S.W.2d 347 (Tex. Civ. App.—Dallas 1979, no writ). In both cases, prejudgment interest challenges were considered waived since, by failing to secure trial court rulings on the requests, motions for new trial were required to preserve the complaint. *See also Brown Oil Tools v. Broughton*, 353 S.W.2d 505 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.) (relying upon Texas Rule of Civil Procedure 373 (p. 28a) and *Plasky v. Gulf Ins. Co.*, 335 S.W.2d 581 (Tex. 1960)).

Indeed, petitioner vigorously opposed petitioner's request for prejudgment interest on the verdict, setting forth several grounds therefore,[29] received an adverse ruling (p. 24a), further objected to the award once judgment was entered (p. 68a-70a) and received an additional adverse ruling (p. 75a). Clearly, the complaint was preserved.

Lastly, several miscellaneous waiver cases further establish the inadequacy of the nonfederal ground relied upon by the Supreme Court of Texas. Surely, petitioner's trial court reference to *Barton v. Zapata Offshore Company,*[30] which relates to the identical theory that was subsequently urged to the Court of Appeals (p. 81a), "may fairly be considered sufficient" to preserve the issue for review![31] Indeed, why weren't the waiver rules ignored in the instant case, as they were in *Barron v. James,* 198 S.W.2d 256, 260 (Tex. 1946),[32] in light of the "many ways" in

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29. Due to the obvious confusion which existed regarding awards of prejudgment interest in maritime matters prior to *Wyatt v. Penrod Drilling Co.,* 735 F.2d 951 (5th Cir. 1984), petitioner presented several supported grounds for the denial thereof to the trial court (p. 43a-59a). Indeed, it was precisely this confusion which prompted the trial court to erroneously award prejudgment interest at respondent's insistence (p. 60a). In *Wyatt* the Fifth Circuit adopted "Judge Rubin's resolution of the problems created by our somewhat conflicting precedents", *Id.* at 956, as set forth in *Barton v. Zapata Offshore Co.,* 397 F.Supp. 778 (E.D. La. 1975).

30. 397 F Supp. 778 (E.D. La. 1975).

31. In *First Coleman Nat'l Bank of Coleman v. Shields,* 166 S.W.2d 688, 689 (Tex. Comm'n App. 1942, opinion adopted), a search of the record disclosed "allegations which, though they seem to relate in part at least to other theories of defense, may fairly be considered sufficient to present the defense" upon which the court of appeals relied for reversal.

32. In *Barron,* the Supreme Court of Texas, conceding that petitioner's motion for new trial "does not strictly comply" with the rules governing such motions, simply concluded, in light of the "many ways throughout the trial . . . petitioners brought to the attention of the trial court [the] contention" now urged, "that in our opinion the assignment in the motion should not be disregarded as too general," contrary to the court of appeals' holding.

which petitioner brought to the attention of the trial court its prejudgment interest challenge?

Similarly, why was petitioner "cut-off" in the instant case, contrary to *Hodge v. Ellis*, 277 S.W.2d 900, 908 (Tex. 1955)?[33] Doesn't the record establish that respondent successfully recovered under both the Jones Act and the general maritime law in a case tried to a jury on special issues? Doesn't the record further establish that "the jury's answers to [the] special [issues] did not reveal any basis for holding that some of the damages were in compensation for the admiralty [unseaworthiness] claim alone,"[34] rather than Jones Act negligence? (p. 38a-39a). Why, then, must petitioner in this case, contrary to *Hodge*, use certain words to satisfy the Supreme Court of Texas or "otherwise spell out the legal conclusions" which flow from the record?

The only realistic answer to all of these questions:[35]

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33. In *Hodge*, although the court opined that the "most serious argument against election is that the point was not raised until the appeal," a review of the pleading "did bring the elements of election to the court's attention," as evidenced by the allegation that respondent was "claiming both against and under the will" and that the suit filed by him plead "all relevant facts, including the will itself." Under these circumstances, the court concluded, "the failure of the petitioners-defendants to use the word 'election' or otherwise spell out the legal conclusions to follow from the facts shown by the pleadings should not cut them off."

34. *Wyatt v. Penrod Drilling Co.*, 735 F.2d at 956 (5th Cir. 1984).

35. Indeed, reference to several lower appellate court opinions similarly prompts the unambiguous conclusion that petitioner did all, albeit more, than was required of it to preserve the error involved herein. *See Lynch v. Port of Houston Authority*, 671 S.W.2d 954, 957 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (statement that doctrine of sovereign immunity "is violative of the rights granted to plaintiffs by . . . the Constitution of the United States of America" held sufficient to raise equal protection and due process arguments); *Sonenthal v. Wheatley*, 661 S.W.2d 169, 173 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (wherein, contrary to the instant case, although "different arguments and

Simply because the Supreme Court of Texas wished to evade the federal issue![36]

In light of the clear impact of the documents filed by petitioner in both the trial court and the Court of Appeals, and the authorities cited herein, the precise reasons and motivations for the Supreme Court of Texas' waiver ruling is left to greater minds to ponder. That the ruling is neither supported by the record in this case, nor the jurisprudence of the State of Texas, has been established and cannot be doubted. Further discussion of the error would only serve to dignify it.

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authorities are found in the appellants' [brief] than are found in [their trial court document], . . . we believe that any fair reading of the entire argument before the district court discloses that the appellants [have preserved the error] and thus "we do not view it as a new position asserted for the first time on appeal").

36. When considering the adequacy of an asserted nonfederal ground of decision which arguably impaired its jurisdiction to review federal issues, this Honorable Court has also, on occasion, considered whether said ground serves a "legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443, 447-449 (1965); *Douglas v. Alabama*, 380 U.S. 415, 421-423 (1965); *Camp v. Arkansas*, 404 U.S. 69 (1971). The Supreme Court of Texas' waiver ruling is similarly inadequate when scrutinized under this standard as well. Indeed, that court has recently stated that *private* interests—the affect of surprise on one's opponent—mandate that substantive errors be properly predicated at trial. *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982). Clearly, the Supreme Court of Texas' desire to protect respondent's counsel from "surprise" is inadequate to prevent this Honorable Court's assertion of jurisdiction over federal issues and is surely less compelling than the interests asserted in the cases heretofore cited. Moreover, no atttempt was ever made, nor could have been made in good faith, to establish that respondent was "surprised" by virtue of the petitioner's complaint addressing the trial court's erroneous award of prejudgment interest. The complaint was extensively briefed by both petitioner and respondent in the trial court (p. 40a-66a) and, as evidenced therein, respondent's counsel knew precisely the grounds upon which petitioner relied. Yet, the Supreme Court of Texas nevertheless was compelled to insure that he was not "surprised" on appeal!

4. Contributory Negligence Ruling: Dependent Ground of Decision

Although upon cursory analysis, the ruling regarding the exclusion of evidence of contributory negligence appears to rest upon "independent" state grounds—the striking of petitioner's answer and corresponding "admission" of liability—the fact that respondent's cause of action was based upon the Jones Act, as well as under the general maritime law, prompts a conclusion quite to the contrary. Overlaying the applicable federal law,[37] implicit in the Supreme Court of Texas' ruling is the erroneous proposition that contributory negligence in a maritime case is a liability or fault issue, rather than a damage issue or, more precisely, an issue in mitigation thereof. Indeed, not only did the trial court similarly confuse the issue at respondent's request and erroneously rule accordingly,[38] respondent similarly misguided the Supreme Court of Texas by urging a corollary proposition based solely upon Texas law.[39]

Thus unfolds the lack of "independence" between the contributory negligence ruling and the maritime substantive law. It has been said that where, as here, a nonfederal ground of decision is so interwoven with the federal law such that it is not independent of it, the juris-

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37. *See* authorities cited herein at p. 24, *infra*.

38. *See* p. 36a. The trial court's concern that the jury would be unable to differentiate between the issues of liability and damages with respect to the decedent's contributory negligence was unnecessary and improper. The *only* issue before the jury was damages. Liability had been "admitted" when the interlocutory default judgment was entered as a consequence of the discovery sanctions previously imposed. Thus, the decedent's contributory negligence could *only* have been considered by the jury in mitigation of damages.

39. *See* p. 82a, wherein respondent urged, *inter alia*, that "[c]omparative negligence is a liability or fault issue and not a damage issue" citing *Cypress Creek Utility Services Co., Inc. v. Mullen*, 640 S.W.2d 860, 863 (Tex. 1982). *See also* p. 72a-73a, wherein respondent urged a similar proposition to the trial court.

diction of this Honorable Court is not precluded. *Ake v. Oklahoma,* 105 S. Ct. 1087 (1985); *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.,* 243 U.S. 157, 164 (1917).

5. Contributory Negligence Ruling: Inadequate Ground of Decision

Nor does the ruling satisfy the "adequacy" requirement for jurisdiction preclusion. Preliminarily, it cannot be said that the same judgment would be rendered by the Supreme Court of Texas after this Honorable Court has corrected the erroneous view of the federal law by instructing that contributory negligence in maritime matters is exclusively a damage issue and *not* a liability or fault issue. A negative response to this inquiry prompts the conclusion that the nonfederal ground of decision is inadequate. *Herb v. Pitcairn,* 325 U.S. 117, 125 (1945).

Secondly, the jurisprudence of this state is completely devoid of a single Supreme Court of Texas case which similarly precludes a defaulting litigant in a Jones Act and/or general maritime law context from establishing evidence of contributory negligence in mitigation of damages. It is well settled that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this court applied for by those who, in justified reliance upon prior decisions,[40] seek vindication in state courts" of rights grounded in federal law. *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 457 (1958); *see also NAACP v. Alabama ex rel. Flowers,* 377 U.S. 288, 301 (1964).

Lastly, review of a recent Supreme Court of Texas decision prompts a conclusion contrary to that reached in the instant case and therefore evidences the inconsistent and uneven application of its ruling. *See Hathorn v.*

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40. *See generally Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953) and authorities herein at p. 24, *infra.*

Lovorn, 457 U.S. 255, 263 (1982) and authorities cited in note 20, *supra*.

Faced with the proposition that an interlocutory default judgment admits all well-pleaded allegations *of liability*, thereby limiting trial to the issue of damages alone,[41] the Supreme Court of Texas has recently had occasion, in *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729 (Tex. 1984), to consider precisely what is "admitted" by reason of a default and, more importantly, precisely what is not. Reasoning that in personal injury (and presumably death) cases, two distinct aspects of causation exist, a causal nexus between the defendant's conduct and the event sued upon, and a causal nexus between the event sued upon and the plaintiff's injuries (or death), the court concluded that only the former, or "liability" portion of plaintiff's cause of action, is admitted by default, whereas the latter "is strictly referable to the damages portion of the plaintiff's cause of action." *Id.*, at 732.

Extending this analysis to the instant case, it follows that petitioner "admitted" that its negligence under the Jones Act, as well as the unseaworthiness of the involved vessel, caused the event sued upon. It did not admit, however, that the event sued upon caused the decedent's death. This latter nexus "is part and parcel of proving the amount of damages to which plaintiff is entitled." *Id.* The inescapable conclusion is that other factors including, but not necessarily limited to, contributory negligence, are germane to this latter inquiry *despite* the existence of a liability default. Indeed, "[t]hat the defendant has defaulted does not give plaintiff the right to recover for damages which did not arise from his cause of action" *Id., such as that portion attributable to his own contributory negligence!*

41. *Stoner v. Thompson*, 578 S.W.2d 679 (1979).

PART II

1. Prejudgment Interest: Direct Conflict

The award of prejudgment interest in the instant case (p. 24a) is in *direct* conflict with applicable[42] maritime jurisprudence in several particulars.

Preliminarily, since the jury's answers to the special issues (p. 38a-39a) provided no basis for determining which portion of the damage award was attributable to respondent's general maritime law claim, for which prejudgment interest is recoverable, as opposed to the portion of the award attributable to Jones Act negligence, for which prejudgment interest has been held to be improper in an action at law,[43] the judgment is in *direct* conflict with *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (5th Cir. 1984), *Domangue v. Penrod Drilling Co.*, 748 F.2d 999 (5th Cir. 1984), as well as *Barton v. Zapata Offshore Co.*, 397 F.Supp. 778 (E.D. La. 1975), which was cited with complete approval and adopted in *Wyatt*.[44]

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42. Federal law, rather than state law, governs the propriety of an award of prejudgment interest in maritime matters. *See Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54 (5th Cir. 1981), adopting rule set forth in *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973). *See also Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (1984). Indeed, as respondent pointed out in her brief in support of prejudgment interest filed in the trial court, the "parties stipulated before trial that federal maritime law governs this case." (p. 60a).

43. *Theriot v. J. Ray McDermott & Co., Inc.*, 742 F.2d 877 (5th Cir. 1984); *see also Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972) and cases cited therein at 1168; *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958 (5th Cir. 1969) and cases cited therein at 972. Prejudgment interest has been similarly disallowed in cases arising under Federal Employers' Liability Act, 45 U.S.C. § 51. *Faulkenberry v. Louisiana & Arkansas Ry. Co.*, 551 F.2d 650 (5th Cir. 1977); *Kozar v. Chesapeake and Ohio Ry. Co.*, 449 F.2d 1238 (6th Cir. 1971); *see generally Carver v. Consolidated Rail Corp.*, 600 F.Supp. 125 (E.D. Penn. 1984).

44. *Compare Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487, 491 (5th Cir. 1985) ("[W]hen a Jones Act claim is brought under the court's admiralty jurisdiction, and hence the case is tried

Secondly, the award of prejudgment interest was based upon elements of recovery which had not "accrued" as of the date of judgment,[45] in *direct* conflict with the "well considered rule that prejudgment interest may not be awarded with respect to future [unaccrued] damages." *Wyatt,* 735 F.2d at 956 n.3 & 4; *see also Williams v. Reading & Bates Drilling Co.,* 750 F.2d 487, 491 (5th Cir. 1985).

2. Contributory Negligence Ruling: Conflict in Principle

The exclusion of evidence addressing the decedent's contributory negligence (p. 36a) conflicts *in principle* with applicable maritime law[46] both as legislatively created[47] and judicially interpreted by this Honorable Court and the federal courts of appeals. Furthermore, the ruling *directly* conflicts with the only reported decision addressing the right to mitigate damages by establishing evidence of contributory negligence in a post-default context rendered by a federal district judge sitting in admiralty.[48]

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to the court and not to the jury, the allowance of prejudgment interest is within the discretion of the trial court even if there is not a finding of unseaworthiness").

45. Prejudgment interest was awarded on unaccrued elements of recovery as found by the jury in response to special issues 1(a) (past and future loss of society), 1(b) (past and future ecomonic loss) and 3 (punitive damages) (p. 38a-39a). *See* p. 48a, 54a, 55a and p. 80a, note 8.

46. The principles of maritime law set forth herein apply equally to proceedings instituted in state court. *See Beadle v. Spencer,* 298 U.S. 124 (1936).

47. Section 53 of the Federal Employers' Liability Act, 45 U.S.C., incorporated into the Jones Act by reference, 46 U.S.C.A. § 688, expressly provides that contributory negligence "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to [plaintiff]." (p. 26a).

48. *Singara v. F/V JO-ANN,* 1977 A.M.C. 875 (D. Mass. 1977).

The conflict *in principle* arises in light of the admiralty's concern that substantial justice be given to litigants.[49] Consequently, a decedent's contributory negligence is not available as a defense to bar recovery. *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 429 (1939). Nevertheless, the existence of contributory negligence relates to the diminution of damages, *Comeaux v. T.L. James & Co., Inc.,* 666 F.2d 294, 299 (5th Cir. 1982), and therefore is considered in mitigation thereof whether the liability finding is based upon negligence under the Jones Act or unseaworthiness under the general maritime law. *Scott v. Fluor Ocean Services, Inc.,* 501 F.2d 983, 984 (5th Cir. 1974).

Such evidence is therefore admissible, albeit essential, to aid in the fair and proper determination of damages and, consequently, it has been consistently held that a maritime litigant is entitled to establish evidence of contributory negligence in mitigation of damages. *See also Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 408 (1953); *Symonette Shipyards, Ltd. v. Clark,* 365 F.2d 464, 470 (5th Cir. 1966); *Kopczynski v. THE JACQUELINE,* 742 F.2d 555, 558 (9th Cir. 1984). The concept has been previously applied by the Supreme Court of Texas in *B-R Dredging Co. v. Rodriguez,* 564 S.W.2d 693, 697 (Tex. 1978).

As heretofore mentioned, implicit in this principle is the proposition that evidence of contributory negligence relates solely to the issue of damages and has no bearing whatsoever on the issue of liability. Indeed, "the issue of contributory negligence does not arise in a Jones Act suit unless and until the jury finds the defendant negligent." *Nolan v. Greene,* 383 F.2d 814, 817 (6th Cir.

49. The distribution of fault in admiralty and maritime matters has long been governed by a pure comparative fault scheme. *The Max Morris,* 137 U.S. 1 (1890).

1967).[50] Surely, then, it cannot be said that the procedural irregularities which plagued petitioner precluded it from establishing evidence of contributory negligence in mitigation of damages. The existence of liability, whether found or admitted, *triggers* the right to establish such evidence, it does *not* eliminate it. Thus arises the conflict in principle.

A *direct* conflict exists between the instant case and *Singara v. F/V JO ANN*, 1977 A.M.C. 875 (D. Mass. 1977), in which a federal district judge, sitting in admiralty, clearly and properly held that a defaulting litigant was entitled to mitigate its damages by establishing evidence of contributory negligence.

The cases are virtually identical. As in the instant case, the defendant in *F/V JO ANN* was defaulted as a result of discovery sanctions. Consequently, said defendant, like petitioner, had no answer on file. As in the instant case, the applicable procedural rule[51] required that contributory negligence be affirmatively plead. In both cases, liability was "admitted" and only damages were at issue at trial.[52] Lastly, the plaintiff in *F/V JO ANN*, like respondent herein, urged that defendant was precluded from introducing evidence of contributory negligence by reason of the default (p. 72a-73a; p. 82a-83a). The United States District Court of Massachusetts, contrary to the Supreme Court of Texas, clearly and properly concluded otherwise.

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50. Both logic and concerns for uniformity would prompt the same statement based upon a finding of unseaworthiness under the general maritime law.

51. In this respect it is crucial to note that the partial source of Tex. R. Civ. P. 94, as evidenced by the advisory notes thereafter, is Fed. R. Civ. P. 8(c) (p. 26a-27a). Thus, the court in *F/V JO ANN* reached a result which is contrary to that reached in the instant case even though it was faced with the federal procedural rule from which the Texas rule is, in relevant part, derived.

52. *See Wall v. Wall*, 630 S.W.2d 493, 496 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.); *Village Square, Ltd. v. Barton*, 660 S.W.2d 556, 559 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

3. Contributory Negligence Ruling: Federally Created Substantive Rights Cannot be Defeated by Local Forms of Procedure

In *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949)[53] this Honorable Court, granting certiorari "because the implications of the [disposition below] were considered important to a correct and uniform application of the federal act in the state and federal courts," *Id.*, at 295, reversed and remanded the Supreme Court of Georgia holding, *inter alia*, that a federally created substantive right "cannot be defeated by the forms of local practice." *Id.*, at 296. The reason for this principle is clear: The desirable uniformity in the adjudication of federally creative substantive rights could not be achieved if local procedural requirements are applied to the deprivation of these rights. *Id.*, at 299.[54]

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53. In *Brown*, a railroad employee brought an action under the Federal Employers' Liability Act, 45 U.S.C. § 51, alleging that he was injured when he stepped on a large clinker alongside the tracks in the railroad yard. The Georgia state courts dismissed his complaint, holding that it was insufficient to state a cause of action, on the ground that a Georgia rule of procedure required pleadings to be construed most strongly against the pleader, and that under this rule, absent allegations to the contrary, the reference arose that he could have seen and avoided the clinker and further that he had failed to precisely allege that the clinker was beside the track due to employer negligence.

54. The Supreme Court of Texas has cited the *Brown* opinion for proposition aforesaid on at least two occasions and is obviously aware of "the basic premise that substantive rights governed by the F.E.L.A. cannot be interfered with, lessened or destroyed by a state rule of practice or procedure." *Dutton v. Southern Pacific Transp.*, 576 S.W.2d 782, 784 (Tex. 1978); *Scott v. Atchison, Topeka and Santa Fe Ry. Co.*, 572 S.W.2d 273, 281 (Tex. 1978). Many lower courts of this state have similarly recognized, and applied, the principle announced in *Brown*. *Missouri-Kansas-Texas R.R. Co. v. Franks*, 399 S.W.2d 905, 911 (Tex. Civ. App.—Dallas 1966, writ dism'd by agr.); *Texas & New Orleans R.R. v. Arnold*, 381 S.W.2d 388, 390 (Tex. Civ. App.—Beaumont 1964), writ dism'd, 388 S.W. 2d 181 (Tex. 1965); *Texas & Pacific Ry. Co. v. Younger*, 262 S.W. 2d 557, 560 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.).

Although the distinction between substance and procedure is often evasive, it presents no difficulty in this case. Indeed, it is elementary that the "requirement to plead an affirmative defense is a procedural rule." *Glass Containers Corp. v. Miller Brewing Co.*, 643 F.2d 308 (5th Cir. 1981). Similarly, it cannot be disputed that a maritime or FELA litigant's ability to mitigate its damages by establishing evidence of contributory negligence is a federally created substantive right. The term "substantive right" has been interpreted to embrace every manner of claim for relief, whether constitutionally, legislatively or judicially created. *Day v. Avery*, 548 F.2d 1018, 1022 (5th Cir. 1976), *cert. denied*, 431 U.S. 908 (1977).

The substantive right urged by petitioner throughout this entire matter, the right to mitigate its damages by establishing evidence of the decedent's contributory negligence, is *both* legislatively and judicially created. Section 53 of the FELA, incorporated into the Jones Act by reference, expressly provides that contributory negligence "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to [plaintiff]." (p. 26a). Furthermore, this legislatively created Jones Act right has not only been judicially recognized, interpreted and refined, it has also been judicially extended to cases arising under the general maritime law of unseaworthiness. *Scott v. Fluor Ocean Services, Inc.*, 501 F.2d 983, 984 (5th Cir. 1974).

Yet contrary to *Brown*,[55] and notwithstanding the

55. The Supreme Court of Texas has recognized that FELA decisions are applicable to suits under the Jones Act by reason of the incorporation of the former's provisions into the latter. *Hopson v. Gulf Oil Corp.*, 237 S.W.2d 352 (Tex. 1951) and cases cited therein at 357. *See also Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958, 962 (5th Cir. 1969) which cites *Hopson* with approval for the same proposition.

Supreme Court of Texas' implicit erroneous ruling that contributory negligence in maritime matters is a liability or fault issue, that court, through the application of a local rule of pleading requiring that contributory negligence be affirmatively plead, has denied petitioner's plain and reasonable assertion of a federally created substantive right. Indeed, although petitioner's answer had been struck as a discovery sanction, the defense of contributory negligence was affirmatively plead therein (p. 30a). Additionally, petitioner's trial brief outlined its entitlement to establish such evidence under the applicable maritime jurisprudence (p. 32a-35a) and reasserted its right to mitigate its damages once respondent had rested (p. 36a).

Given the procedural circumstances of this case, this denial applies with equal force to genuine no-answer defaults, in addition to discovery defaults, and therefore the importance of the ruling cannot be underestimated. Surely, a denial of the right to mitigate damages by establishing evidence of contributory negligence improperly deprives the defaulting maritime litigant of substantial relief which Congress, and the judiciary, has afforded it.

4. A Plea for Uniformity

Of paramount importance to the development of the maritime law in the United States has been a desire for uniformity. Indeed, as early as 1815, Justice Story wrote of "the advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions."[56]

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56. *DeLovio v. Boit*, 7 F.Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

As evidenced by the instant case, the desire for uniformity has been elusive and petitioner respectfully calls upon this Honorable Court, not only to remedy misapplications of the maritime law, but to guide the lower courts of this country on the questions presented. Indeed, although the propriety of prejudgment interest in both a Jones Act and a general maritime law context has been addressed by several federal courts of appeals as set forth herein, a review of these decisions indicate a general lack of uniformity and pose a significant issue clearly within this Honorable Court's domain. Sup. Ct. R. 17.1(b) and (c).

Similarly, the ability of a defaulting maritime litigant to mitigate its damages by establishing evidence of contributory negligence, although supported *in principle* by the decisions of the federal courts of appeals and this Honorable Court, and *directly* supported by a federal district court sitting in admiralty, poses a significant inquiry equally worthy of this Honorable Court's attention. *Id.* Surely the Supreme Court of Texas' disposition of the issue presents "novel questions as to the interplay of state and maritime law," *cf. Kossick v. United Fruit Co.*, 365 U.S. 731, 733 (1961), and is germane to the degree in which state courts may supplement, modify or totally destroy, as in the instant case, rights which have been afforded by Congress and the federal judiciary.

CONCLUSION

For these reasons, petitioner, Aquamarine Operators Inc., respectfully requests that this Honorable Court gran its petition for writ of certiorari and proceed to th merits of the issues presented.

Respectfully submitted,

THOMAS A. BROWN
BROWN, SIMS, WISE & WHITE
2000 S. Post Oak Blvd.
Twenty-Third Floor
Houston, Texas 77056
(713) 629-1580

Counsel of Record

Of Counsel:

JOSEPH J. FINKEL
BROWN, SIMS, WISE & WHITE

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APPENDIX

APPENDIX 1

Opinion: Supreme Court of Texas

Ida E. DOWNER,
Petitioner,

v.

AQUAMARINE OPERATORS, INC.,
Respondent.

No. C-4141.

Supreme Court of Texas.

Dec. 4, 1985.

Rehearing Denied Jan. 15, 1986.

WALLACE, Justice.

This is an appeal from a judgment for damages in a suit brought under the Jones Act and under admiralty law. The trial dealt only with damages because the trial court struck the defendant's answer as a discovery abuse sanction and signed an interlocutory default judgment as to liability. The court of appeals reversed the trial court judgment, holding that the action of that court was an error of law and an abuse of discretion. 689 S.W.2d 472. We reverse the judgment of the court of appeals and affirm the judgment of the trial court.

The issues before us are whether TEX. R. CIV. P. 215a(c), as it existed prior to the amendment effective August 1, 1984, authorized the trial court to strike defendant's answer, and, if so, whether the exercise of that authority constituted an abuse of discretion.

Edward P. Downer was a seaman aboard the vessel Four Point IV. He drowned while attempting to free a line that had fouled the vessel's propeller. Ida E. Downer, his widow, brought this action against Aquamarine Operators, Inc., the owner and operator of the vessel. The case was filed in the 151st District Court of Harris County. Both Downer and Aquamarine are residents of Harris County, Texas.

Downer filed Notice of Intent to Take the Depositions of All Members of The Crew on June 1. The notice identified each crew member, including the captain, Chester P. Dalfrey, by name only. Downer also requested depositions of the immediate supervisor of Chester Dalfrey and the custodian of Edward Downer's personnel file. On June 1, Aquamarine notified Downer that the crew was at sea and would not appear. Aquamarine at that time agreed to produce the requested persons on June 22. On June 21, Aquamarine again notified Downer that the crew was at sea and would not appear. It agreed to produce them on July 5.

Downer filed written Notice of Intent to Take Depositions of the same individuals for July 5. On that date, the requested deponents did not appear, whereupon Downer filed a Motion for Sanctions. A hearing on the Motion for Sanctions was set for August 22. Aquamarine made no appearance at the hearing, the trial court granted the Motion for Sanctions and signed an Order Striking Aquamarine's Answer.

Downer filed a Motion for Interlocutory Default Judgment to which Aquamarine responded. The response contained Aquamarine's reasons for not producing the requested individuals for depositions and its failure to appear at the sanctions hearing.

The reason offered for the first two occasions was that work for the FOUR POINT IV was scarce and, when work was available, it was necessary to send the vessel and crew to sea rather than produce them for depositions. On the third occasion, the vessel was in port at New Iberia, Louisiana, but Coast Guard regulations required a skeleton crew to be kept aboard at all times. Aquamarine's attorney stated that he notified Downer's attorney on July 1 of the necessity to take the depositions in New Iberia. Downer's attorney stated that he first learned that the individuals would not appear as noticed when Aquamarine's attorney called him an hour after the depositions were scheduled to commence. Both agreed that Aquamarine requested that the depositions be taken in New Iberia on July 6. However, Downer's attorney stated that he could not do so because he was preferentially set for trial in Houston starting at 9:00 a.m. on July 6.

The reason given by Aquamarine for not appearing at the sanctions hearing was that Hurricane Alicia had struck La Porte, the residence of Mr. Ayres, Aquamarine's lead counsel, four days previously. Mr. Ayres was involved in cleaning up after the hurricane and mitigating the damages to his home. Also, he had a hearing set in federal court in Beaumont on the following day and was directing all of his available attention to that matter.

To his Motion to Reconsider the Sanctions, Mr. Ayres attached an affidavit from his secretary, which stated that she had called the clerk of the court on July 7, and had advised her that Mr. Ayres had to make a docket call in Angleton on August 22. She understood the clerk to say that the sanctions hearing would be reset for September 6. In response to this motion, Downer's attorney advised the court by letter of his version of the circumstances

leading up to the non-appearance on July 5, and the time when he was first advised that the named individuals would not appear. Attached to this letter to the court was a copy of a letter dated July 28, written by Mr. Bales, an associate of Mr. Ayres, which confirmed that the sanctions hearing was set for August 22.

With the above information before it, the trial court overruled Aquamarine's Motion to Reconsider the Sanctions and to reinstate its answer. The court signed an order granting an interlocutory default judgment as to liability. Aquamarine filed a Motion to Set Aside the Default Judgment. The motion contained practically the same information as the Motion to Reconsider Sanctions set out above. The trial court considered this motion and overruled it. On April 16, 1984, the case was preferentially set for trial for June 4, and the trial court refused to consider Aquamarine's Second Motion to Set Aside the Interlocutory Default Judgment and Reinstate Defendant's Pleadings.

A jury trial was had in a different court, the 334th District, on the issue of damages. At the trial, Chester Dalfrey testified that he was captain of the FOUR POINT IV and as such he was in complete charge of the vessel with authority over all of its operations. Mr. Clark Ivans testified that he was president of Aquamarine at all times pertinent to this case, and that as such, he was the immediate supervisor of Chester Dalfrey.

[1] We now address the issue of whether the trial court had authority under Rule 215a(c) to strike Aquamarine's answer. That rule stated in pertinent part:

> If a party or an officer or managing agent of a party, except for good cause shown, fails to appear before

> the officer who is to take his oral deposition . . . the court in which the action is pending on motion and notice may strike out all or any part of the pleading of that party or dismiss the action or proceeding or any part thereof. . . .

As noted above, Ivans testified that as president of Aquamarine he was in complete charge of all operations of the company. Thus he was a party as contemplated by Rule 215a(c).

[2, 3] The next question is whether the trial court, in refusing to grant a new trial and reinstate Aquamarine's answer, could consider the evidence introduced subsequent to the original sanctions hearing. Aquamarine contends that the trial court, in imposing sanctions, could consider only the evidence before it at the time of the sanctions hearing, and not any evidence subsequently produced. A trial court's plenary jurisdiction gives it not only the authority but the responsibility to review any pre-trial order upon proper motion. In doing so, it is presumed that the court is familiar with the entire record of the case up to and including the motion to be considered. The plenary jurisdiction of the trial court in this case continued through the final judgment and overruling of Aquamarine's motion for new trial. When considering the motion for new trial, the court had before it the reasons advanced by Aquamarine for not appearing for depositions or the sanctions hearing; Downer's response to Aquamarine's motion; and the evidence produced at the trial on damages. Thus, the court of appeals erred in holding that the trial court did not have authority under Rule 215a(c) to strike Aquamarine's answer.

We now turn to the court of appeals holding that the trial court abused its discretion in striking Aquamarine's

answer. The court of appeals concluded its review of the abuse of discretion issue by stating: "The facts of the case simply do not, in our opinion, show this to be an appropriate case to impose the ultimate sanctions of striking the pleadings and entering default judgment." We interpret that statement to mean that the court of appeals disagreed with the decision of the two trial judges who reviewed the matter.

[4] The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. *Craddock v. Sunshine Bus Lines,* 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. Comm. App.—1939, opinion adopted). Another way of stating the test is whether the act was arbitrary or unreasonable. *Smithson v. Cessna Aircraft Co.,* 665 S.W.2d 439, 443 (Tex. 1982); *Landry v. Travelers Insurance Co.,* 458 S.W.2d 649, 651 (Tex. 1970). The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Southwestern Bell Telephone Co. v. Johnson,* 389 S.W.2d 645, 648 (Tex. 1965); *Jones v. Strayhorn,* 321 S.W.2d 290, 295 (Tex. 1959).

To determine the trial judge's guiding rules and principles in imposing sanctions for discovery abuse, we must look to the Texas Rules of Civil Procedure as promulgated and amended by this Court as well as the decisions of appellate courts of this State and of the United States. The Texas Rules of Civil Procedure pertaining to discovery and sanctions for noncompliance

have been amended several times, culminating in Rule 215a as it existed at the time of this case, and now embodied in Rule 215. The use of sanctions by trial courts to prevent discovery abuse has developed steadily over the past several years. These changes reflect the continuing pattern both to broaden the discovery process and to encourage sanctions for failure to comply.

The United States Supreme Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S. Ct. 2778, 49 L.Ed.2d 747 (1976) approved the use of sanctions not only to assure compliance with the discovery process but also to deter those who might be tempted to abuse discovery in the absence of a deterrent.

This court and various courts of appeals have also followed this progression. *See, e.g., Dyson v. Olin Corp.*, 692 S.W.2d 456 (Tex. 1985), (Kilgarlin, J., concurring) (unnamed witness not permitted to testify); *Jarrett v. Warhola,* 695 S.W.2d 8 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd), (plaintiff's cause of action dismissed); *City of Houston v. Arney,* 680 S.W.2d 867 (Tex. App.—Houston [1st Dist.] 1984, no writ) (defendant's answer struck for failure to answer interrogatories); *Southern Pacific Transportation v. Evans,* 590 S.W.2d 515 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (defendant's answer struck and interlocutory default judgment rendered as to liability), *cert. denied,* 449 U.S. 994, 101 S. Ct. 531, 66 L.Ed.2d 291 (1980).

In various speeches and law review articles, different members of this court have encouraged trial judges to use sanctions to the degree necessary to assure compliance with discovery procedures and deter abuse of the process.

Barrow and Henderson, *1984 Amendments to the Texas Rules of Civil Procedure Affecting Discovery*, 15 ST. MARY'S L.J. 713 (1984) (presented to the Texas College of the Judiciary Nov. 29, 1984); Kilgarlin and Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 ST. MARY'S L.J. 767 (1984); Pope and McConnico, *Practicing Law With the 1981 Texas Rules*, 32 BAYLOR L. REV. 457 (1981); Spears, *The Rules of Civil Procedure: 1981 Changes In Pretrial Discovery*, 12 ST. MARY'S L.J. 633 (1981).

The trial court in this case was free to examine the factors before it to determine whether to levy sanctions. Among these were the following: (1) whether voluntarily sending the crew to sea rather than producing them for depositions as agreed on two occasions was in conscious disregard of this court's rules; (2) whether the contradictory statements of both attorneys indicated that Aquamarine's attorney did in fact wait until one hour past the scheduled time for depositions on July 5, to advise Downer's attorney that he would have to fly to New Iberia and take depositions on the following day; (3) whether Aquamarine's attorney consciously disregarded the sanctions hearing in preference to his personal needs and the federal court case set the following day; (4) whether the information contained in the secretary's affidavit as to the date of the sanctions hearing conflicted with the letter from an attorney in that law firm confirming that the hearing was set on August 22; and (5) the unexplained failure of Aquamarine to produce for depositions on any of the occasions in question Clark Ivans, the immediate supervisor of Chester Dalfrey and the president of Aquamarine.

[5] The record contains no indication that the trial court was capricious, arbitrary, or unreasonable. Thus,

the court of appeals erred in holding that the trial court abused its discretion.

In determining whether to reverse and render this cause or to remand it to the court of appeals, we must look to the four points of error raised by Aquamarine before the court of appeals but not addressed by that court. If those points raise questions of law, as opposed to questions of fact, they can be addressed by this court.

The first point was that Downer's First Amended Original Petition was insufficient to support the judgment. The contention is that the facts supporting the cause of action were not pleaded. TEX. R. CIV. P. 47 requires that a petition contain a short statement of the cause of action sufficient to give fair notice of the claim involved. Our rules do not require pleadings to contain evidence or factual detail. That point is overruled.

[6] The second point was that the trial court improperly refused to strike a juror for cause. After the court had ruled on challenges for cause, there were 26 names left on the jury list. Each party was given six jury strikes, so, after making those strikes, 14 names remained on the list. The challenged juror was Number 14 and was thus a spare. There was no harm in refusing to dismiss him for cause.

[7] The third point was that the trial court improperly refused to admit evidence of Downer's contributory negligence. Contributory negligence is an affirmative defense which must be pleaded. Aquamarine's answer had been struck and default judgment rendered as to liability. Thus, defendant had no pleading to support contributory negligence, so the court did not err in refusing to admit the requested evidence.

[8] Aquamarine's remaining point before the court of appeals was that the trial court erred in awarding prejudgment interest in a Jones Act case tried to a jury. This point was not presented to the trial court and was thus waived.

Aquamarine's points of error presented to the court of appeals but not considered by that court concerned questions of law over which we have jurisdiction. There is no merit to these points so it is not necessary for this cause to be remanded to the court of appeals.

The judgment of the court of appeals is reversed and the judgment of the trial court is affirmed.

APPENDIX 2

Opinion: Court of Appeals

AQUAMARINE OPERATORS,
Appellant,

v.

Ida E. DOWNER,
Appellee.

No. C14-84-635CV.

Court of Appeals of Texas,
Houston (14th Dist.).

Feb. 28, 1985.

Rehearing Denied April 4, 1985.

ROBERTSON, Justice.

Aquamarine Operators, Inc. appeals a judgment for $1,685,988.00 entered after the trial court struck its pleadings as a discovery sanction. The controlling issue on appeal is whether those sanctions were proper. After a careful review of the record, we believe the court's action was erroneous and accordingly reverse and remand the cause.

The facts forming the basis of this lawsuit can be briefly summarized. Appellee's husband died while working as a seaman on appellant's vessel. Appellee brought a wrongful death action under the Jones Act and general maritime law. After appellant's answer to this pleading was filed, appellee issued notice to take oral depositions of eight people. These people were scheduled for deposi-

tion three times, twice by notice and once by agreement, but appellant notified appellee on two of those occasions that they were unable to attend because their vessel was "out at sea." On the day following the last of these two notices, appellee filed a motion for sanctions and a hearing on that motion was set. Only the appellee appeared at that setting and the judge thereafter entered an order striking appellant's answer. The trial court subsequently refused to set aside his order granting sanctions, and after a jury trial was held solely on the issue of damages, judgment was entered against appellant.

While appellant raises six points of error challenging the judgment, we believe the first two points are dispositive of the appeal. Appellant first contends that the trial court erred as a matter of law in striking its answer because Rule 215a, Texas Rules of Civil Procedure, which contained discovery sanctions applicable at that time, permitted the trial judge to strike a party's pleadings only when a "party or an officer or managing agent" failed to comply with a discovery request. Thus, it argues, since the witnesses here noticed for deposition were not parties, this particular sanction was not an available option. We agree.

[1] To properly address this issue, we first turn to the then applicable language of rule 215a.

> Failure of Party or Witness to Attend. If a *party or an officer or managing agent of a party*, except for good cause shown, fails to appear before the officer who is to take his oral deposition or his answers to written questions or cross-questions under these rules, after proper service of subpoena or notice as provided in Rule 201, the court in which the action is pending on motion and notice may

> strike out all or any part of the pleading of that party, or dismiss the action or proceeding or any part thereof, or direct that such party shall not be permitted to present his grounds for relief or his defense, or enter a judgment by default against that party, or make such other order with respect thereto as may be just.
>
> Any *witness* who, except for good cause shown, fails to appear before the officer who is to take his oral deposition or answers to written questions or cross-questions under these rules, after proper service of subpoena, may be punished as for contempt of the court in which the action is pending or of the district court in the district in which such deposition or answers are to be taken, and an attachment may issue out of such court for such witness, as in ordinary civil cases. (Emphasis added.)

TEX. R. CIV. P. 215a(c) (Vernon 1976). This rule obviously makes a distinction between parties and witnesses. *See Barrientos v. Texas Employers' Insurance Association,* 507 S.W.2d 900, 903 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.). It therefore becomes our task to determine whether the trial court had sufficient information before it to decide if the requested deponents fell within the "party" catego We are guided in this determination by the principle that the movant, here the appellee, had the burden of proof before the trial court. *See Mobile, Inc. v. Cone,* 457 S.W.2d 175, 176 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.).

[2] The record before us reveals that only certain pertinent information was before the trial court at the time the sanctions were granted. It included a notice of deposition filed May 4, 1983, requesting the appearance of the following persons with no further designation of their status:

1. William Balou;
2. Chester P. Dalfrey;
3. Ross Pearce;
4. Clifford Crider;
5. Ernest Richardson;
6. Donald Doswell;
7. The supervisor of Chester P. Dalfrey;
8. Custodian of the entire personnel file for Edward Pierce Downer.

A second notice contained an identical listing. The actual motion for sanctions itself was the only document indicating that any of the requested deponents were anything but crew members. This motion, sworn to by appellee's attorney, referred to "the entire crew as well as the captain's supervisor and a member of Aquamarine Operators to discuss the fringe benefit program for the Decedent." At the time the sanctions were granted the requested deponents had not been further identified in any of the papers before the court.

It is also noteworthy that there evidently was not a "hearing" on the motion for sanctions. The "Notice of Submission" notified appellant that the motion would be heard on July 18, 1983, "without the necessity of an oral hearing *unless one is requested by you.*" (Emphasis supplied). While this hearing was reset to August 22, neither appellant nor his counsel appeared on that date (as will be shown later on) and neither the order granting sanctions nor the docket sheet reflects the court heard any evidence.

Even stretching these listings and sworn statements to the point of implications, we do not believe the trial court had sufficient evidence before it to characterize any of the noticed persons as "a party or an officer or managing agent of a party" as required by the rule. The crew obviously does not fit into any of those categories. While the supervisor of Chester Dalfrey, the captain,[1] might be considered a managing agent of the *vessel,* this bears no relationship whatsoever to the required category, that is, a managing agent of the *party,* Aquamarine Operators.[2] *See Davis v. Sea Fresh Fisheries, Inc.,* 1983 A.M.C. 1165 (W.D. Wash. 1981). The noticing of the custodian of records, alternatively referred to as a member of Aquamarine Operators, is equally ambiguous. Such a designee need not, by definition or implication, be an official of the corporate party. Under this record it was not possible for the court to determine that any of these people were parties, or officers or managing agents of the party defendant, Aquamarine Operators. Consequently the court could not, as a matter of law, strike appellant's pleadings under the dictates of rule 215a.

While we believe that the trial court did not have the authority to impose this sanction, of equal importance in our decision is the issue of whether that action constituted an abuse of discretion. *See Bass v. Duffey,* 620 S.W.2d 847, 849 (Tex. Civ. App.—Houston [14th Dist.]

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1. Although Chester Dalfrey was eventually identified as the captain, the trial court record did not specifically contain an identification of him as such at the time the sanctions were granted.

2. In her brief, appellee states that the notice of deposition required appellant to produce "its President as the supervisor of Captain Dalfrey." The record before us indicates that the record available to the trial court at the hearing on sanctions is devoid of any information indicating that the president of Aquamarine Operators had been noticed.

1981, no writ). We are aware of the recent judicial trend of taking firmer action for discovery abuse. *See, e.g.*, Kilgarlin & Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 St. Mary's L.J. 767 (1984). Although we believe the facts here did not present an appropriate case for the extreme discovery sanction imposed, in light of the trend to the contrary, we will carefully detail the series of events leading to the trial court's granting of the motion for sanctions.

Plaintiff-appellee filed her original petition on January 27, 1983. On May 4, 1983, she filed the first notice of intention to take depositions on June 1, 1983. On June 1, appellant's attorney called appellee's attorney and informed him that he had just been notified that the crew was out at sea and therefore was unavailable for the deposition. The two attorneys then informally agreed to reset the depositions for June 22, 1983. On June 21, appellant's attorney told appellee's attorney that the crew was again at sea and would not be able to attend the deposition scheduled for the next day. Appellant's attorney suggested that the crew would be able to attend a July 5 deposition in Houston, and appellee's attorney thereafter noticed a deposition for that date and location.

There is some dispute as to the next turn of events. In a response to the motion for sanctions, appellant's attorney stated under oath that on July 1, he contacted counsel for appellee and requested that the depositions be taken in New Iberia, Louisiana, where the crew's vessel was docked. The crew was unable to go to Houston as scheduled because a skeleton crew had to remain with the vessel at all times. He further stated that appellant chartered a plane and informed appellee's counsel that they would fly him to New Iberia at their expense. On

the morning of July 5, appellant's counsel called counsel for appellee to give him directions to the airport where the chartered airplane was waiting. He was informed by the secretary that appellee's attorney was out of the office. That afternoon appellant's attorney was notified that appellee's attorney refused to make the trip. In an *unsworn* letter to the court (in answer to appellant's response to the motion for sanctions), appellee's attorney asserted that appellant's recitation of the events of July 1 was "blatently false." He stated that appellant's attorney did not contact him at all on July 1, and in fact did not call him until 10:00 a.m. on July 5, one hour after the deposition was to begin. Appellee's attorney told the court that only at this point did counsel offer to fly him to New Iberia, which request he did refuse because he was preferentially set for trial the next day.

The next day, July 6, appellee filed her motion for sanctions, and the hearing thereon was set for July 18, 1983. Appellant responded to this motion, detailing the above-described events. Appellee responded to this with the unsworn letter, pointing out inaccuracies in appellant's allegations. The trial court had all of this information before it at the time it signed the order granting the sanctions on August 22.

While this summarization completes the chronological facts leading to the granting of sanctions, several other factors significant to the court's decision are also presented in the record. First, appellant's attorney had a number of reasons for not appearing at the hearing. Hurricane Alicia came through on August 18, and appellant's attorney, who lives in La Porte, suffered storm damage to his residence as a result thereof. Appellant's attorney was also scheduled for trial on August 22.

Finally, and perhaps most importantly, appellant's counsel's secretary filed an affidavit indicating that she had been told the hearing was scheduled for *September 6*, 1983. She stated that the clerk of the trial court called her to confirm the availability of the August 22 hearing date. The secretary checked counsel's calendar and found a conflict on that date. She called the clerk and notified her of the conflict, at which time they agreed on the September 6 date. The clerk said she would call appellee's counsel to confirm that date with him, and that she would call the secretary back only if there was a problem. The clerk did not return the call, so she assumed the September 6 setting was correct. These scheduling problems certainly are of some value in the decision to strike pleadings.

Appellant points out further facts for our consideration. First, the very nature of its business is such that it is difficult to produce the crew for deposition. When the crew ships out, they often spend substantial periods of time offshore. The crew would often have to return to an offshore oil patch shortly after arriving onshore. Furthermore, because of the currently depressed offshore oil industry, appellant suggested that they found it necessary to take work whenever they could find it, even if before a scheduled deposition. Secondly, none of the deponents resided in Texas, making it difficult to attend a Houston deposition.

We also note that appellee apparently never sought *only* the harsh sanction imposed. In the motion, appellee's prayer was in the alternative—either strike the pleadings and enter default judgment *or* award attorney's fees for the three days lost. In appellee's letter (referenced above) to the court, appellee reasserted the request for sanctions

"and in addition, would at least ask this Court to enter an Order compelling the Defendant to produce its crew within thirty (30) days" for depositions.

The very timetable of this cause indicates a factor for consideration regarding abuse of discovery. The cause had been on file less than eight months, and the motion for sanctions was granted less than four months after the first notice of deposition. Although the motion itself was on file for over a month when the motion was granted, appellee's attorney was on vacation from July 28 until August 18. In a sworn affidavit, an attorney from appellant's firm said that he spoke with appellee's attorney before he left on vacation in an attempt to reschedule the depositions before the sanction hearing. Since such rescheduling was impossible, appellant's attorney asked him to pass the hearing on the motion for sanctions and promised that he would produce the crew upon counsel's return. Appellee's attorney said that he would not pass, but that he would not request the court to strike appellant's pleadings but rather would only ask for an order compelling the crew members' appearance.

[3] Under this state of the record, we cannot hold that the trial court did not abuse its discretion. While the depositions were scheduled twice formally, and once by agreement, this is not outrageous in light of the explained nature of appellant's work. The appellate record does not indicate that appellant's crew ever actually refused to appear, but rather evidences that appellant requested reschedulings due to their unavailability. Although there are some conflicts in the various versions of the facts, these conflicts, along with the short time between the first scheduled deposition and the granting of sanctions, clearly presented a vague enough situation that the judge

should not have resorted to striking appellant's pleadings. Though we certainly can understand the court's apparent irritation at appellant's counsel's failure to appear at the sanctions hearing, the subsequent response outlining his reasons for non-appearance further fortifies our belief that the court abused its discretion.

Appellee places significant reliance on *Wiley v. Browning*, 670 S.W.2d 729 (Tex. App.—Tyler 1984, no writ). We believe this reliance is misplaced. In that case a party-defendant to a lawsuit failed to appear for a noticed deposition. After this single absence, the plaintiff filed a motion for sanctions. A hearing was held, and the trial court granted the motion and defaulted the defendant. The Tyler court found the trial court had not abused its discretion. We do not find the decision controlling here because we believe there are several distinguishing factors. First, the defendant there never notified the plaintiffs that he would not be present. Secondly, he did not offer to appear at a later date for his deposition, and when questioned by the court, the defendant stated "I let my wife handle all the business she could, and I didn't want to be bothered with it." Finally, the parties had informally agreed to depositions on "several" prior occasions, but none of these had resulted in the taking of a deposition. This is easily contrasted with this case, where appellant, although cancelling depositions, made efforts to reschedule them each time. Furthermore, the cancellations did not appear to be deliberate evasions, but rather were a result of appellant's work conditions.

Appellee also relies upon the recent case of *City of Houston v. Arney*, 680 S.W.2d 867 (Tex. App.—Houston [1st Dist.] 1984, no writ) where the court approved the granting of sanctions by striking the defendant's answer

and entering default judgment. The facts of that case do not, however, compare with the facts of this case. In *Arney*, answers to interrogatories were due six months prior to the striking of defendant's answer. During this time an order was issued compelling answers, which order was completely ignored by the defendant. No action was taken by the defendant until plaintiff's motion for sanctions was filed. This is easily contrasted with appellant's repeated attempts to reschedule depositions in the four months period between the first notice and the order striking its pleadings.

We find comfort in the language of the United States Supreme Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S. Ct. 2778, 2781, 49 L.Ed.2d 747 (1976):

> [T]he most severe in the spectrum of sanctions [dismissal or default] provided by statute or rule must be available to the district court *in appropriate cases*, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. (Emphasis added).

The facts of this case simply do not, in our opinion, show this to be an appropriate case to impose the ultimate sanction of striking the pleadings and entering default judgment.

In conclusion, we hold the granting of the discovery sanctions constituted both an error at law and an abuse of discretion. Having thus disposed of appellant's first two points, it is unnecessary to discuss the remaining points.

The judgment is reversed and the cause remanded with instructions to reinstate appellant's answer.

APPENDIX 3

Final Judgment

FINAL JUDGMENT, SIGNED JUNE 22, 1984.
ENTERED: Volume 2782, Page 449, General Minutes, District Courts, in and for Harris County, Texas.

NO. 83-08655

IN THE DISTRICT COURT
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

IDA E. DOWNER

v.

AQUAMARINE OPERATORS, INC.

FINAL JUDGMENT

BE IT REMEMBERED that on the 8th day of June, 1984, came on to be heard the above cause after it had been set for trial in due manner with reasonable notice to all parties at a regular term of this Court and appeared in person Plaintiff IDA E. DOWNER, Individually and as Executrix of the Estate of EDWARD DOWNER by and through her attorneys of record, and appeared the Defendant AQUAMARINE OPERATORS, INC., by and through its corporate representatives and attorneys of record, and all parties announced ready for trial.

Thereafter, the parties through their attorneys, conducted a voir dire examination of a panel of qualified jurors and were permitted to exercise all their challenges

for cause and peremptory challenges and a jury of 12 qualified jurors was duly selected and sworn in as the jury in this cause.

Thereafter, the parties made their opening statement and presented their evidence until the 14th day of June, 1984, when all parties announced in open Court that they rested and had no further evidence to present.

Thereafter, the Court prepared a written charge of special issues to be submitted to the jury and tendered that charged to the attorneys for examination and inspection and gave them full opportunity to present objections to the charge. Thereafter, the Court read its written charge to the jury, and then the parties, through their attorneys, were allowed to present oral argument to the jury. Thereafter, the jury was retired to deliberate its verdict.

Thereafter, on the 14th day of June, 1984, the jury returned in open Court and announced through its foreman that it had reached a verdict on all issues in the Court's charge. Thereafter, in open Court and the presence of the jury and the attorneys for the parties, the Court determined that the verdict was properly signed and rendered by 10 members of the jury and then read aloud the verdict and the jury's answers to the special issues. Thereafter, the Court inquired of the attorneys whether there was any objection to receiving the verdict and there being none, the Court ordered that the verdict be received and filed among the papers of the cause. Thereafter, the jury was discharged.

Thereafter, Plaintiff filed her Motion for Judgment. The Court heard such Motion, including the Motion and supporting evidence of Plaintiff, IDA E. DOWNER, in-

dividually and as Executrix of the Estate of EDWARD DOWNER, for prejudgment interest, and found that Plaintiff is entitled to judgment for all the damages awarded by the jury in the amount of One Million Five Hundred Thousand Dollars ($1,500,000.00) plus prejudgment interest at the rate of 8.67% as proven by the Plaintiff, plus costs of court and post-judgment interest.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Plaintiff, IDA E. DOWNER, Individually, recover of and from Defendant AQUAMARINE OPERATORS, INC. the sum of One Million Six Hundred Eighty Five Thousand Nine Hundred Eighty Eight Dollars ($1,685,988.00), consisting of $1,450,000 plus prejudgment interest in the amount of $235,988.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff IDA E. DOWNER, as the Executrix of the Estate of EDWARD DOWNER, recover of and from Defendant AQUAMARINE OPERATORS, INC., the sum of Fifty Eight Thousand One Hundred Thirty Eight Dollars ($58,138.00), consisting of $50,000 plus prejudgment interest in the amount of $8,138.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all recoveries granted herein are to bear interest at the legal rate of 10% from and after the date that this Judgment is rendered until paid.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff is to have the right to writs of execution upon the property of Defendant and all the rights and remedies for the collection of judgments if this judgment is not timely paid.

SIGNED and RENDERED this the 22nd day of June, 1984.

/s/ KEN HARRIS
Judge Presiding

APPROVED:

O'QUINN & HAGANS

/s/ JOHN O'QUINN
John O'Quinn (TBA#15296000)
3200 Texas Commerce Tower
600 Travis
Houston, Texas 77002
(713) 223-1000

Attorney for Plaintiff

APPENDIX 4

Statutory Provisions

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

Fed. R. Civ. P. 8 (c). Affirmative Defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Tex. R. Civ. P. 94. Affirmative Defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issues unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

(Amended by order of March 31, 1941, eff. Sept. 1, 1941.)

Source: Portion of Federal Rule 8(c), unchanged. See Rule 71 for the balance of Federal Rule 8(c)

Tex. R. Civ. P. 243. Unliquidated Demands.

If the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default shall be noted, a writ of inquiry awarded, and the cause entered on the jury docket.

(Amended by order of March 31, 1941, eff. Sept. 1, 1941.)

Source: Art. 2157, unchanged.

Tex. R. Civ. P. 373. Exceptions Unnecessary.

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Source: Federal Rule 46, unchanged.

APPENDIX 5

Original Answer of Defendant

DEFENDANT'S ORIGINAL ANSWER. FILED: MARCH 4, 1983. RAY HARDY, District Clerk, Harris County, Texas. By B. Lovett, Deputy.

NO. 83-08655

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

IDA E. DOWNER

v.

AQUAMARINE OPERATORS

ORIGINAL ANSWER OF DEFENDANT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Aquamarine Operators, Defendant herein, and makes this its Answer to Plaintiff's Original Petition and would respectfully show as follows:

I.

By way of special exception, the Defendant would respectfully show as follows:

(a) Plaintiff's Original Petition fails to allege a cause of action against Defendant Aquamarine Operators, and should therefore be dismissed with prejudice;

(b) Defendant specifically excepts to Plaintiff's conclusions in paragraphs II, III, IV and V because of the

allegations of defective, unseaworthy and negligent conditions of the vessel FOUR POINT IV because Plaintiff does not set forth facts upon which she relies to support the conclusion of negligence and unseaworthiness, and without such facts Defendant is greatly handicapped in preparation of its case.

Of which special exceptions, each being taken separately and apart from each other, Defendant Aquamarine Operators prays judgment of the Court, together with costs.

II.

Without waiving the foregoing special exceptions, but still insisting upon the same, for further answer in, if any be necessary, this Defendant denies each and every, all and singular, the allegations contained in said petition and demands strict proof thereof, and with this prays trial by jury.

III.

Without waiving the foregoing special exceptions, and general denial, but still insisting upon same, for further answer and as a separate defense, if any be necessary, this Defendant would show that if Edward Pierce Downer were injured as alleged, although it is not so acknowledged, such injuries and ultimate demise were solely the result of his own negligence, and that said negligence was a proximate cause, in whole or in part, of the Plaintiff's injuries, if any.

IV.

Without waiving the foregoing special exceptions, and general denial, but still insisting upon the same, for

further answer and as a separate defense, this Defendant affirmatively alleges that if Edward Pierce Downer was injured as alleged, although it is not so acknowledged, such injuries were the result of an accident and that such accident was unavoidable.

WHEREFORE, PREMISES CONSIDERED, this Defendant prays that upon trial hereof, it have judgment in its behalf, together with costs, and that it go hence without day and that it have such other and further relief, both special and general at law and in admiralty, to which it may prove itself justly entitled.

Respectfully submitted,

BROWN, SIMS & AYRE

By: /s/ TERRY P. AYRE
Terry P. Ayre
2000 Post Oak Blvd.
Suite 2300
Houston, Texas 77056
(713) 629-1580

Attorneys for Defendant,
Aquamarine Operators

APPENDIX 6

Excerpts from Trial Brief of Defendant, Aquamarine Operators

DEFENDANT'S TRIAL BRIEF. FILED: JUNE 8, 1984.
RAY HARDY, District Clerk, Harris County, Texas.
By T. English, Deputy.

NO. 83-08655

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

IDA E. DOWNER

v.

AQUAMARINE OPERATORS

TRIAL BRIEF OF DEFENDANT,
AQUAMARINE OPERATORS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Aquamarine Operators, Inc., Defendant in the above-entitled and numbered cause, and files this, its Trial Brief respectfully showing unto this Honorable Court the following:

* * * *

III. DEFENDANT AQUAMARINE OPERATORS, INC. IS ENTITLED TO INTRODUCE EVIDENCE OF THE PLAINTIFF'S DECEDENT'S COMPARATIVE NEGLIGENCE UNDER ADMIRALTY'S PURE COMPARATIVE NEGLIGENCE SCHEME

In admiralty, unlike Texas and many other jurisdictions, a pure comparative fault scheme has been implemented so as to do substantial justice to the litigants in a given lawsuit. As previously stated, in the event a Plaintiff is found to have been 99% at fault for his own injuries, the Plaintiff will still be entitled to collect damages as reflected by the one percent (1%) of found fault of any Defendants. Due to this application, it has long been established that admiralty comparative, or contributory, negligence is not a defense, but bears solely on mitigation of damages. *See generally, Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 429 (1939), where, when discussing the historical development of the doctrine of comparative negligence, the Supreme Court of the United States stated, "contributory negligence, then as now, was not a defense in suits brought by seaman to recover for injuries attributable to defective equipment, but *was ground only for mitigation of damages." See also, Pope & Talbot v. Hawn, supra,* 346 U.S. at 409, "admiralty has developed and now follows its own fairer and more flexible rule which allows such *consideration of contributory negligence in mitigation of damages* as justice requires." In that case the Court went on to state further with respect to the effect that contributory negligence has on the remedy of unseaworthiness, "The right is in the nature of liability without fault for which contributory negligence is not a bar to recovery although it may be relevant in assessing the damages." *Id.* at 415.

As it is well established in admiralty that the doctrine of comparative negligence does not serve as a bar to recovery, but is relevant to a determination of damages, both with respect to the doctrines of negligence and

unseaworthiness, *Scott v. Fluor Ocean Services, Inc.*, 501 F.2d 983, 984 (5th Cir. 1974), it is evident that this Defendant is entitled to put on evidence of the Plaintiff's decedent's contributory negligence as being relevant to the issue of damages.

A case precisely on point is that of *Singara v. F/V JO-ANN*, 1977 A.M.C. 875 (D. Mass. 1977). In that case, a default judgment was entered against the Defendant due to the failure of the owner and the captain to appear for depositions after repeated notices and a specific order of the court. After the entry of default, the matter proceeded to trial upon the Plaintiff's Motion for Assessment of Damages. After submission, the United States District Court expressly held that, under federal maritime law, contributory negligence relates to mitigation of damages but does not bar recovery on an action for maritime tort. The court further held that although default bars a Defendant from contesting all well-pleaded allegations which bear on liability, when damages are unliquidated and uncertain the Defendant may still litigate the extent of the damages. In that case, as in the instant one, the Plaintiff alleged his own due care which is not an allegation bearing on liability and is, therefore, not established by the default, thereby placing the allegation in issue. The Court explicitly held that, *"the Defendant should not be precluded from introducing evidence of contributory negligence in mitigation of damages." Id.* at 876. A copy of the opinion is attached hereto for the Court's ease of reference.

It is absolutely clear under the Admiralty and General Maritime Law that the issue of contributory negligence relates to the issue of damages and not to defensive matters. *See, Comeaux v. T.L. James & Co.*, 666 F.2d

294, 299 (5th Cir. 1982), *Neal v. Saga Shipping Co.*, 407 F.2d 481, 485 (5th Cir. 1969), *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464, 470 (5th Cir. 1966).

Given the soundly established principle that contributory negligence in admiralty bears directly on the issue of damages, the fact that this Defendant's pleadings have been stricken and an interlocutory default judgment has been entered against it, this Defendant is still entitled under sound principals of law to put on evidence of contributory negligence of the Plaintiff's decedent inasmuch as the trial of this case will be a trial on damages. Therefore, this Defendant is entitled to go into all mitigating factors bearing on the issue of the Plaintiff's damages, especially since the Plaintiff's pleadings place this factor in issue.

The burden of proof with respect to negligence and contributory negligence on the Jones Act claim has been defined as "slight negligence" and "featherweight", and the burden is reciprocal with respect to proving either a Defendant's negligence or Plaintiff's contributory negligence. *Alverez v. J. Ray McDermott & Co., Inc.*, 674 F.2d 1037, 1042-43 (5th Cir. 1982), *McBride v. Loffland Brothers Co.*, 422 F.2d 363, 365 (5th Cir. 1970).

* * * *

APPENDIX 7

Excerpts from Statement of Facts, Vol. III, pgs. 44-47
Date: June 14, 1984

MR. AYRE: Thank you, Judge.

Judge, this is just to make sure your ruling appears on the record with respect to our intention to offer evidence of contributory negligence on the part of the decedent. It's our position that the general maritime law entitles us to go into the issue of comparative or contributory negligence of the decedent by virtue of the fact that it relates solely to mitigation.

The Court earlier expressed some concern that the jury would be influenced or prejudiced and the Court couldn't cure by instruction and instruct the jury to separate in their mind liability from damages. With that in mind, we have prepared a curing instruction for the Court to submit to the jury which we have previously presented, and we would, again, just reassert that we are entitled to go into contributory negligence as a matter of law.

The Court, as I understand, has ruled against us on that.

THE COURT: All right. I will overrule your motion to offer evidence on contributory negligence.

MR. BALE: Judge, may we have our curing instruction stamped refused?

THE COURT: Yes, you may.

MR. AYRE: Then we will file that with the Clerk He can just write on there refused and sign it.

MR. BALE: The reason we would offer this instruction, at this point, we are about to proceed into our case and we believe that it would be proper at this juncture to offer this instruction to the jury.

THE COURT: I understand.

(Whereupon, the trial resumed at 10:50 a.m. and the following proceedings were held in the presence of the jury:)

THE COURT: Call your first witness.

MR. AYRE: We would call Captain Chester Dalfrey.

APPENDIX 8

Excerpts from Charge of the Court

CHARGE OF THE COURT. FILED: JUNE 14, 1984. RAY HARDY, District Clerk, Harris County, Texas. By T. English, Deputy.

NO. 83-08655

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 334th JUDICIAL DISTRICT

IDA E. DOWNER

v.

AQUAMARINE OPERATORS, INC.

CHARGE OF THE COURT

* * * *

ISSUE NO. 1

What sum of money, if paid now in cash, would fairly and reasonably compensate MRS. IDA DOWNER for her losses as a result of the death of her husband, EDWARD DOWNER?

You must take into account the following elements of damage and none other. Consider each element of damage separately, and do not include damages for one element in any other element.

(a) IDA DOWNER'S past and future loss of EDWARD DOWNER'S love, affection, care, attention, companionship, comfort and protection.

Answer in dollars and cents.

Answer: $100,000

(b) The past and future economic loss resulting from the death of EDWARD DOWNER taking into account the loss of support, maintenance, services, advice, counsel and reasonable contributions of a pecuniary value.

Answer in dollars and cents.

Answer: $350,000

ISSUE NO. 2

What sum of money, if paid now in cash, would have fairly and reasonably compensated EDWARD DOWNER for his conscious pain and mental suffering during his drowning?

Answer in dollars and cents.

Answer: $50,000

ISSUE NO. 3

What sum of money, if paid now in cash, should be assessed against AQUAMARINE OPERATORS, INC. as punitive damages for the death of EDWARD DOWNER?

"Punitive damages" are damages awarded in addition to actual damages as a penalty or to set an example to deter Aquamarine and others from engaging in similar conduct.

Answer in dollars and cents.

Answer: $1,000,000

* * * *

APPENDIX 9

Motion for Judgment

MOTION FOR JUDGMENT. FILED: JUNE 15, 1984. RAY HARDY, District Clerk, Harris County, Texas. By M. Dawkins, Deputy.

NO. 83-08655

IN THE DISTRICT COURT
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

IDA E. DOWNER

v.

AQUAMARINE OPERATORS, INC.

MOTION FOR JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiff and moves the Court to render Judgment in her favor and against Defendant AQUAMARINE OPERATORS, INC., and for such would respectfully say and show as follows:

I.

Based upon the verdict of the jury, together with the pleadings and evidence, Plaintiff Ida E. Downer, Individually and as legal representative of the Estate of Edward Downer, is entitled to Judgment against Defendant, AQUAMARINE OPERATORS, INC., in the amount of One Million Five Hundred Thousand Dollars ($1,500,000.00) together with pre-judgment interest,

costs of Court and post-judgment interest. Plaintiff respectfully requests the Court to hear evidence concerning pre-judgment interest and award pre-judgment interest at a rate commensurate with the prevailing fair market interest rates.

II.

Plaintiff would respectfully request the Court to take judicial notice of the current post-judgment rate, as ascertained by the Consumer Credit Commission of Texas, of 10% (ten percent), and exhibited by *The Credit Code Letter* published by the Office of Consumer Credit Commissioner, Volume 3, Number 49 (June 5, 1984), attached as Exhibit A.

III.

Plaintiff would respectfully show the Court that pre-judgment interest is a proper element of recovery under the federal admiralty and maritime doctrine of *restitutio in intergum. United States v. M/V ZOE COLOCOTRONI,* 602 F.2d 12, 13-14 (5th Cir. 1979); *National Airline, Inc. v. Stiles,* 268 F.2d 400, 404-406 (5th Cir. 1959); *see Domangue v. Eastern Airlines,* 722 F.2d 256, 263 (5th Cir. 1984) (copies of which are attached as Exhibits B, C and D).

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Court grant her Motion for Judgment and render a Judgment awarding her the relief above requested and such other relief as to which she may be justly entitled.

Respectfully submitted,

O'QUINN & HAGANS

/s/ JOHN O'QUINN
John O'Quinn
(TBA#15296000)
Michael Kerensky
(TBA#11331500)
3200 Texas Commerce Tower
600 Travis
Houston, Texas 77002
(713) 223-1000

Attorneys for Plaintiff

NOTICE OF HEARING

You will take notice that the above Motion for Judgment has been set for oral hearing on Monday, June 18, 1984, at 9:00 a.m. in the 334th Judicial District Court, Harris County, Texas.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Judgment and Notice of Hearing has been hand delivered to opposing counsel on this the 15th day of June, 1984 by hand delivery.

/s/ JOHN O'QUINN
John O'Quinn
Attorney for Plaintiff

APPENDIX 10

Defendant's Response to Plaintiff's Motion for Judgment

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR JUDGMENT. FILED: JUNE 18, 1984. RAY HARDY, District Clerk, Harris County, Texas. By T. English, Deputy.

NO. 83-06855

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

IDA E. DOWNER

v.

AQUAMARINE OPERATORS, INC.

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Aquamarine Operators, Inc., Defendant, and files this Response to the Plaintiff's Motion for Judgment and as grounds respectfully asserts the following:

I.

Plaintiff has asserted in her Motion for Judgment that she is entitled to award of pre-judgment interest. Plaintiff has asserted that pre-judgment interest is a proper element

of recovery under the Federal Admiralty and Maritime Doctrine of *restitutio in integrum*. However, as will be shown hereinbelow the Plaintiff's cause of action under the Jones Act was an action of law and, therefore, this doctrine is inapplicable. Even the cases put forth by Plaintiff as standing for this proposition negate her assertion that pre-judgment interest is a proper element of recovery in this case.

First of all, the Plaintiff has cited *United States v. M/V ZOE COLOCOTRONI*, 602 F.2d 12, (5th Cir. 1979). That case was a vessel collision case, and the claims arising out of the incident in question were cognizable only in admiralty, in the truest since of the word. As will be shown hereinbelow, this fact alone distinguishes that case from the one presently at bar. In this case, the Plaintiff's claim arose under the Jones Act and General Maritime Law. Since the Jones Act is a congressionally created action *at law*, pre-judgment interest is not awardable under the doctrine of *restitutio in integrum*, even if a General Maritime Law claim is concurrently asserted with the Jones Act claim. *See, Barton v. Zapata Offshore Company*, 397 F.Supp. 778 (E.D.L.A. 1975), discussed *infra*.

The Plaintiff has also cited *National Airline, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959), as also standing for this proposition. That case was a wrongful death case arising under the Death On the High Seas Act. In its opinion, the Court clearly distinguished between the awardability of pre-judgment interest under the Death On the High Seas Act and the non-awardability of pre-judgment interest under the Jones Act.

It is significant to note, as was pointed out by the Court, that the Death On the High Seas Act states two

things very plainly which militate in favor of an award of pre-judgment interest. First, the recovery under the Death On the High Seas Act is to be for a " 'a fair and just compensation for the *pecuniary loss sustained,*' ". The second significant distinction is that the Death On the High Seas Act created a *right of action in admiralty*. Id. at 405. Therefore, claims arising under the Death On the High Seas Act, like collision cases arise purely in the admiralty context triggering the discretionary award of pre-judgment interest under the doctrine of *restitutio in integrum.*

The *Stiles* court clearly distinguished the differing rules with respect to an award of pre-judgment interest under the Jones Act and the Death On The High Seas Act, as follows:

> "The Jones Act and FELA cases are clearly distinguishable because in each of them Congress created a cause of action *at law* (though the Jones Act Plaintiff may elect to sue in admiralty) which, moreover, comprehends the right of the Plaintiff to recover for pain and suffering and injuries up to the date of trial and as to the future. It is quite understandable that Congress may have enacted these statutes in light of the common law rule on interest because where the injuries and consequences of injuries continue up to the date of trial and beyond it would be much easier to figure damages as of the date of trial. This would not be so in the case of a simple death statute, where the entire loss occurs at one time and is measured as of that time. It is also understandable that the Court would apply the same rule as to interest under the Jones Act whether the particular suit was for death or for injury and pain and suffering and whether the suit was brought in admiralty or on the law side of

> the Court. On the other hand, it is equally understandable that when Congress created the right of action 'pecuniary loss' for death only and created it as solely an admiralty action it intended for it to be governed by the traditional admiralty conception of interest as an element of the loss sustained by the claimant."

Id. at 406.

Apparently, the Court developed this discussion in response to the Appellant's argument in that Death On The High Seas Case where the Appellant relied heavily on federal cases decided under the Jones Act and the Federal Employers Liability Act which *hold that judgments under those statutes cannot include interest for the period preceding judgment. Id.*

Lastly, the Plaintiff cites *Domangue v. Eastern Airlines, Inc.*, 722 F.2d 256 (5th Cir. 1984), which is again readily distinguishable from the case at bar. That case involved a wrongful death action arising under the Warsaw Convention and Montreal Agreement. This factor alone demonstrates that this case is not controlling in view of the posture of the present case involving the Jones Act, which provides for a completely different rule with respect to an award of pre-judgment interest. It is highly significant to note that a controlling factor in that Court's decision to award pre-judgment interest was the inequitable conduct of the Defendant in delaying the proceeding prior to trial. *Id.* at 264.

The current case was tried within one and one-half years of the institution of suit and within two years from the date of the Plaintiff's decedent's death. That is not an inordinate delay in view of the current back log of cases in Harris County, Texas.

Defendant would call this Court's attention to the case of *Barton v. Zapata Offshore Company*, 397 F.Supp. 778 (E.D.L.A. 1975) where Judge Reuben, now a member of the Court of Appeals for the Fifth Circuit, clearly and plainly set forth the proposition that when a Plaintiff asserts claims arising under the Jones Act and General Maritime Law, when tried together, the joinder of the Jones Act claim precludes an award of pre-judgment interest, absent a completely separate and distinguishable admiralty claim being joined.

In developing the opinion, the Court stated:

> "The first reef the Plaintiff must negotiate is a line of Fifth Circuit jurisprudence holding that *pre-judgment interest may not be awarded in Jones Act cases tried to a jury. Barrois v. Louisiana Construction Materials*, 5 Cir. 1972, 465 F.2d 1157; *Sanford Bros. Boats, Inc. v. Vidrine*, 5 Cir. 1969, 412 F.2d 958."

When addressing the issue of when Jones Act claims and General Maritime Law claims are joined together, the Court stated as follows:

> "In sum, the Plaintiff may not claim the benefits of a jury trial on an unseaworthiness claim completely merged with a Jones Act claim as to quantum and then attempt to unscramble the verdict after he prevails."

Id. at 780.

The Court also recognized that the doctrine of *restitutio in integrum* involves equitable concepts of delay created by a Defendant when the Court stated, "Even if the Court had discretion to award pre-judgment in-

terest, this does not seem to be a proper case for such an award. This suit was filed on May 2, 1974. It came to trial on May 5, 1975. There was not inordinate delay." *Id.*

As previously pointed out, the present case proceeded to trial in a very rapid fashion and the Plaintiff was occasioned no delay which was the fault of this Defendant.

The logic of *restitutio in integrum* is to make whole the losses occurring prior to trial. In this case, at least the One Million Dollars ($1,000,000.00) awarded as punitive damages does not reflect any loss occurring prior to trial. Secondly, the only admiralty cases cited by the Plaintiff made awards for pre-judgment interest for *pecuniary* losses.

Therefore, the only item for which this Court could even consider an award of pre-judgment interest, under the Plaintiff's rationale, would be on the Three Hundred and Fifty Thousand Dollars ($350,000.00) pecuniary item of damages awarded by the jury.

However, Defendant asserts that the rule is absolutely crystal clear that the Plaintiff is not entitled to an award of pre-judgment interest.

Equity also dictates that the Plaintiff may not be awarded pre-judgment interest since there has been no delay occasioned by the Plaintiff which was caused by this Defendant.

II.

Defendant also requests that this Court refrain from entering judgment on June 18, 1984, since Defendant will not have had an opportunity to review any proposed judg-

ment submitted by the Plaintiff prior to that date. When notified of the hearing on the Motion for Judgment by Plaintiff's counsel on the afternoon of June 15, 1984, no proposed judgment had been forwarded to Defendant. Further, no proposed judgment was received in the offices of counsel for Defendant as of the evening of June 15, 1984. This case is currently in an inherently problematic procedural posture for the entry of judgment and Defendant may require some time in which to study the Plaintiff's proposed judgment so as to perfect its position for appeal. Therefore, Defendant respectfully requests that this Honorable Court deny Plaintiff's Motion for Judgment since a duly proposed copy was not forwarded to counsel to Defendant prior to the date of the hearing and, therefore, improper notice has been given to Defendant as to the entry of judgment.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that this Honorable Court in all things deny the Plaintiff's Motion for Judgment with respect to an award of pre-judgment interest since, as a matter of law, the Plaintiff is not entitled to an award of pre-judgment interest under the claims asserted by her. Defendant further requests that this Court refrain from entering judgment the time this matter comes to hearing before this Court on June 18, 1984, since the Defendant has not had an opportunity to review any proposed judgment submitted by the Plaintiff. In view of the procedural posture of this case, difficulties will be inherent in the entry of judgment and Defendant may require additional time to review the Plaintiff's proposed judgment prior to its entry by this Court.

Respectfully submitted,

BROWN, SIMS & AYRE

/s/ TERRY P. AYRE
Terry P. Ayre
TBA NO. 01470000
2000 Post Oak Blvd.
Suite 2300
Houston, Texas 77056
(713) 629-1580

Attorneys for Defendant, Aquamarine Operators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent to all counsel of record by certified mail, return receipt requested or by hand delivery this 16 day of June, 1984.

/s/ TERRY P. AYRE
Terry P. Ayre

APPENDIX 11

Defendant's Supplemental Response to Plaintiff's Motion for Judgment

DEFENDANT'S SUPPLEMENTAL RESPONSE TO PLAINTIFF'S MOTION FOR JUDGMENT. FILED: JUNE 20, 1984. RAY HARDY, District Clerk, Harris County, Texas. B. Callahan, Deputy.

NO. 83-08655

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

IDA E. DOWNER

v.

AQUAMARINE OPERATORS

DEFENDANT'S SUPPLEMENTAL RESPONSE TO PLAINTIFF'S MOTION FOR JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Aquamarine Operators, Inc., Defendant, and files its Supplemental Response to the Plaintiff's Motion for Judgment and as grounds in support thereof respectfully calls the Court's attention to the following:

I.

At the conclusion of evidence and argument at the hearing on the Plaintiff's Motion for Judgment conducted on June 18, 1984, the Court requested that supplemental briefs be filed to assist the Court in rendering its decision

as to whether or not pre-judgment interest is properly awardable in this case. In addition to the cases, authorities and arguments put forth in Defendant's original response to the Plaintiff's Motion for Judgment, Defendant asserts that the law is absolutely crystal clear that an award of pre-judgment interest is not awardable in this case. Further, in view of the purpose and intent of the doctrine of *restitutio in integrum*, an award of pre-judgment interest would be highly inequitable in this case based upon the fact that this Defendant would be required to pay interest on damages which have accrued at varying intervals as though each item of damage was incurred by the Plaintiff on August 7, 1982, the date of the Plaintiff's decedent's death.

II.

One of the cornerstone Jones Act cases has addressed the issue of whether or not pre-judgment interest is awardable in a Jones Act case. The Court of Appeals for the Fifth Circuit in *Sanford Bros. Boats, Inc. v. Vidrine,* 412 F.2d 958 (5th Cir. 1969), definitively resolved this issue against the position now taken by the Plaintiff:

> "We consider next the issue of pre-judgment interest. The District Court in entering judgment for Plaintiff awarded interest on the judgment from the date of judicial demand. *This was error.* The instant case was tried on the law side of the federal court in accordance with the Plaintiff's election that the case be tried to a jury. [cite omitted]. While pre-judgment interest has been deemed appropriate in Jones Act cases tried in admiralty, [cites omitted], the *courts* have *uniformly held that pre-judgment interest is not available* in FELA case and *in Jones Act cases tried at law.*"

Id. at 972.

The Court went on to state further:

> "We have considered Appellee's arguments for departing from this rule and sustaining the award of pre-judgment interest. However, we find them unpersuasive. We have also considered the possible effect of the recent unification of the admiralty and civil rules [cites omitted], but find nothing therein that would change this result. *The award of pre-judgment interest was therefore improper.*"

Id. at 972-973.

Defendant has previously pointed out to this Court that when a General Maritime Law claim and a Jones Act claim are merged and tried at law to a jury, an award of pre-judgment interest is improper. *See generally, Barton v. Zapata Offshore Company*, 397 F.Supp. 778 (E.D. L.A. 1975).

Although personal injury cases arising in a maritime context can be found which allows for awards of pre-judgment interest, none have been located by Defendant where the basis of the cause of action arose out of the Jones Act. Each case located by Defendant has involved factual settings where the Plaintiff's cause of action arose out of the Death On The High Seas Act, the Longshoremen & Harborworkers' Compensation Act or purely in admiralty. For obvious reasons, under settled principles of law, the distinctions between the cases cited by Plaintiff and the instant one are obvious.

III.

In addition, Defendant asserts that it would be highly inequitable to award pre-judgment interest in a case such as this on an unliquidated claim.

First of all, if pre-judgment interest is awarded on the entire amount claimed by the Plaintiff, Defendant would be paying double interest on the future damages awarded by the jury. The net effect would be that this Defendant would be required to pay both pre-judgment and post-judgment interest on the future damages, thus making the award of interest much higher than the stated amount when the effect of both interest rates is taken into account.

Secondly, an award of pre-judgment interest flies in the face of the purpose and intent of the doctrine of *restitutio in integrum* since the purpose of that doctrine is to make the Plaintiff whole. Defendant would actually be paying a much greater amount in interest than would properly be due the Plaintiff, if a fair attempt is made to make the Plaintiff whole, since many of the items of damage accrued well after the date of the accident made the basis of this suit.

With respect to lost earnings, for example, Defendant would be required to pay a lump-sum amount in pre-judgment interest as though all of Edward Downer's past wages were lost on August 7, 1982, when in reality the loss accrued in weekly increments and was not sustained until payment would have been due under his contract of employment with Aquamarine Operators, Inc. By way of illustration, the wages which Ed Downer would not have earned until June 1, 1984, would bear interest as though due and owing from August 7, 1982.

The problem is exactly the same with the non-pecuniary items of damage involved in this case since each new day triggers an accrual of a loss of love, affection, society, etc. The effect of an award of pre-judgment interest would be that this Defendant would be required to pay interest in a lump-sum for twenty-two (22) months on an award

of $100,000 for this item of damages when a portion of this loss did not accrue until the week before trial.

Given that the intent of *restitutio in integrum* is to make the Plaintiff whole and not to punish the Defendant, a formula which would accurately compensate the Plaintiff would be too cumbersome and unmanageable for sound judicial application. Secondly, there is no evidence in the record which would assist the Court in formulating an appropriate interest figure based upon the differing accrual dates of the various items of damage incurred since the date of the Plaintiff's decedent's death, if an attempt is made to compensate the Plaintiff in accord with reality. The model given to this Court by the Plaintiff through her expert witness on interest rates does not take into consideration the varying accrual dates of loss, but assumes incorrectly and unrealistically that each and every item of loss accrued on the date of the Plaintiff's decedent's death. This model would serve more to punish the Defendant than to compensate the Plaintiff. In this regard, Defendant asserts that the Plaintiff has wholly failed to sustain her burden of proof with respect to proffering a model which would accurately reflect the losses sustained and, therefore, an award of pre-judgment interest should be denied on equitable principles. The award should also be denied on the sound legal principles espoused by the Court of Appeals for the Fifth Circuit which routinely and uniformly deny awards of pre-judgment interest in cases such as the one at bar.

WHEREFORE, PREMISES CONSIDERED, Defendant, Aquamarine Operators, Inc., respectfully prays that this Honorable Court in all things deny an award of pre-judgment interest in this case inasmuch as such an award would be contrary to sound principles of settled law, that

the same would be inequitable under the circumstances outlined above and based upon the fact that Plaintiff has wholly failed to sustain her burden of proof in providing the Court with an accurate, manageable model on which to base an award of pre-judgment interest. Defendant prays for such other and further relief to which it may show itself to be justly entitled.

Respectfully submitted,

BROWN, SIMS & AYRE

/s/ TERRY P. AYRE
Terry P. Ayre
TBA NO. 01470000
2000 Post Oak Blvd.
Suite 2300
Houston, Texas 77056
(713) 629-1580

Attorneys for Defendant, Aquamarine Operators, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent to all counsel of record by certified mail, return receipt requested or by hand delivery this 20th day of June, 1984.

/s/ TERRY P. AYRE
Terry P. Ayre

APPENDIX 12

Letter Brief dated June 21, 1984

LETTER DATED JUNE 21, 1984, TO THE HONORABLE KENNETH HARRISON FROM JEFFREY R. BALE. FILED: AMONG THE PAPERS.

BROWN, SIMS & AYRE
Attorneys
A Professional Corporation
Twenty-Third Floor
Post Oak Central
2000 South Post Oak Boulevard
Houston, Texas 77056-4496

June 21, 1984

VIA HAND DELIVERY
The Honorable Kenneth Harrison
334th Judicial District Court
Cotton Exchange Building
1320 Prairie, 11th Floor
Houston, Texas 77002

Re: No. 83-08655; Ida E. Downer vs. Aquamarine Operators; In the 334th Judicial District Court of Harris County, Texas: Our File: 83:6098E/B

Dear Judge Harrison:

With leave of Court, I must respond briefly to one or two issues raised in the Plaintiff's Brief in Support of Pre-Judgment Interest.

The Plaintiff has cited two cases as standing for the proposition that they have overruled the cases cited by

Defendant with respect to an award of pre-judgment interest in Jones Act cases. These two cases are *Curry v. Fluor Drilling Services, Inc.*, 715 F.2d 893 (5th Cir. 1983) and *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191 (5th Cir. 1982). As the Court will recall, Defendant advised this Court that the settled state of the law was that Jones Act cases, *tried in admiralty*, allow for an award of pre-judgment interest, while Jones Act cases, *tried at law*, do not allow for an award of pre-judgment interest, due to the differing rules on this point between the common law and the admiralty.

Both of the cases cited by the Plaintiff as standing for the proposition that an award of pre-judgment interest is proper in every Jones Act case were both tried *in admiralty*. *See, Curry v. Fluor Drilling Services, Inc., supra,* 715 F.2d at 894, "After a bench trial, the district court rendered judgment for Curry. . . ." *See also, Ceja v. Mike Hooks, Inc., supra,* 690 F.2d at 1192, "The district court found. . . ." Both of these cases were tried in Federal Court without a jury and referred to the general rule in *admiralty*. Therefore, it is reasonably inferrable that these cases were tried pursuant to Fed. R. Civ. P. 9(h) and under the maritime and admiralty jurisdiction of the United States.

Further, the case of *Higginbotham v. Mobil Oil Corporation*, 390 F.Supp. 1140 (W.D. La. 1973), *aff'd in part and rev'd in part on other grounds*, 545 F.2d 422 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978) was also a case tried in *admiralty* to the Court. It is significant to note that a major portion of that case involved extensive interpretation of the Death On The High Seas Act, *an admiralty action*.

None of the cases cited by Plaintiff demonstrate that an award of pre-judgment interest is recoverable in a Jones Act action *tried at law*. Therefore, the distinctions and innuendos pointed out by Plaintiff as to the cases cited in Plaintiff's Brief are neither correct nor controlling with respect to this case Again, the cases cited by Plaintiff support the propositions asserted by Defendant.

By copy of this letter, I am informing counsel for the Plaintiff of our response, which could not be withheld in view of the incorrectness of the rules of law recited in Plaintiff's Brief.

Sincerely,

BROWN, SIMS & AYRE

By: /s/ JEFFREY R. BALE
Jeffrey R. Bale

JRB:vjd
DOWNER

APPENDIX 13

Plaintiff's Brief in Support of Prejudgment Interest

PLAINTIFF'S BRIEF IN SUPPORT OF PRE-JUDGMENT INTEREST. FILED: JUNE 20, 1984. RAY HARDY, District Clerk, Harris County, Texas.
By B. Callahan, Deputy.

NO. 83-08655

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

IDA E. DOWNER

v.

AQUAMARINE OPERATORS

PLAINTIFF'S BRIEF IN SUPPORT
OF PREJUDGMENT INTEREST

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff and files this brief in support of prejudgment interest, and in response to Defendant's brief against prejudgment interest and for such would show as follows:

I.

The parties stipulated before trial that federal maritime law governs this case. Defendant admits that, under federal maritime law, the Plaintiff is entitled to recover prejudgment interest, as is clearly established by numerous federal decisions. *See e.g. Curry v. Fluor Drilling*

Services, Inc., 715 F.2d 893 (5th Cir. 1983); *Helaire v. Mobil Oil Company*, 709 F.2d 1031 (5th Cir. 1983); *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191 (5th Cir. 1982); *National Airline, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959).

Defendant argues, however, that prejudgment interest must be denied in this case because Mrs. Downer alternatively made a claim under the Jones Act which allegedly does not allow prejudgment interest.

The primary answer to Defendant's argument is that Mrs. Downer is entitled to recover prejudgment interest under the general maritime law even if the Jones Act prohibits prejudgment interest. Defendant admits as much when it argues that Mrs. Downer must be deprived of her normal right to prejudgment interest under the general maritime law because she also sued under the Jones Act.

Defendant's "joinder argument" on its surface lacks credibility and seems wrong because it is contrary to the rule recognized in both state and federal court that a party may plead in the alternative and even assert inconsistent claims without prejudice to any of his rights. TEX. R. CIV. P. 47; FED. R. CIV. P. 47(a), (e)(2).

More importantly, Defendant's "joinder argument" is contrary to the controlling federal maritime decisions. The Fifth Circuit has recently held on two occasions that the plaintiff is entitled to recover prejudgment interest where a Jones Act claim is joined with the general maritime claim. *Curry v. Fluor Drilling Services, Inc., supra; Ceja v. Mike Hooks, Inc., supra.*

The Fifth Circuit also held in a recent case that prejudgment interest is recoverable in a Longshoreman and

Harbor Worker's Act claim under general maritime principles. *Helaire v. Mobil Oil Company, supra.*

Additionally, we disagree with Defendant's argument that prejudgment interest is not recoverable under the Jones Act. While older cases support the Defendant's position, there are contrary cases and the most decisions are against the Defendant's position. The Court specifically held in *Higginbotham v. Bell Helicopter Co.*, 360 F.Supp. 1140 (W.D. La. 1973), *aff'd in part and rev'd in part on other grounds,* 545 F.2d 422 (5th Cir.) 1977, *rev'd on other grounds,* 436 U.S. 618 (1978), that prejudgment interest is proper under the Jones Act. Furthermore, in the two recent Jones Act cases cited above, *Curry* and *Ceja,* the Fifth Circuit held that prejudgment interest was recoverable without distinguishing between the Jones Act and general maritime grounds of recovery.

Defendant's "joinder argument" has also been repeatedly rejected by federal decisions holding that the recovery for loss of society allowed by the general maritime law is not affected by the fact that the Plaintiff has also sued under the Jones Act which does not allow a recovery for loss of society. *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980); *Hlodan v. Ohio Barge Line, Inc.*, 611 F.2d 71 (5th Cir. 1980); *Petition of M/V ELAINE JONES*, 513 F.2d 911 (5th Cir. 1975), *cert. denied* 423 U.S. 840; *Landry v. Two R. Drilling Co.*, 511 F.2d 138 (5th Cir. 1975), *reh. denied,* 517 F.2d 675; *see also Annot.*, 53 ALR Fed. 635, § 3 at 641.

These cases hold that even though the rights and remedies under the Jones Act are different than the rights and remedies under the general maritime law, Plaintiff can sue under both the Jones Act and the general

maritime law and is not deemed to have elected any remedies and may recover under whichever law affords the best remedy. So even assuming that the right to prejudgment interest is limited to the general maritime law, the Plaintiff is entitled to that remedy just like the Plaintiff is entitled to recover for loss of society, which is not allowed under the Jones Act, and such right is not defeated or affected by the fact that the Plaintiff also sued under the Jones Act. *Id.*

Against this impressive array of precedent, the Defendant can cite only one lonely district court opinion; namely, the decision in *Barton v. Zapata Off-Shore Co.*, 397 F.Supp. 778 (E.D. La. 1975). This solo citation is evidence of the proposition that if a lawyer researches long enough he can find some case to support almost any argument.

Barton is a district court decision that was neither reviewed nor approved by the Fifth Circuit. It had never been cited by any other federal decision regarding prejudgment interest. It is a lonely aberration on the sea of precedent that has been consistently ignored by all subsequent federal decisions and has sank into the oblivion it so richly deserves.

In an effort to resuscitate *Barton*, Defendant proudly proclaims that its author (Judge Rubin) is now on the Fifth Circuit. What Defendant fails to mention is that Judge Rubin was on the Fifth Circuit panel that recently decided *Ceja*, which specifically holds that prejudgment interest is recoverable in an action based upon the Jones Act and general maritime law. Apparently, Judge Rubin has abandoned his views previously expressed in *Barton*.

II.

Defendant also argues that prejudgment interest should be denied because the delay between Downer's death and the trial was only 22 months.

The federal decisions have also rejected this type of argument and held that neither the amount of nor the reason for the delay is a ground for denying prejudgment interest. Rather, prejudgment interest is awarded not to punish the defendant, but as part of the remedy to which the plaintiff is entitled and is given to make the recovery complete. *Helaire v. Mobil Oil Co., supra; Ceja v. Mike Hooks, Inc., supra; compare Curry v. Fluor Drilling Services, Inc., supra,* where the lapse of time between injury and the *appellate* court's decision was less than four years.

III.

Federal cases hold that the Court must award prejudgment interest unless there are peculiar circumstances warranting a denial. In the *Curry* case, the Fifth Circuit stated:

> In fact, generally in maritime law, prejudgment interest *should* be awarded. *Musial v. A & A Boats, Inc.*, 696 F.2d 149, 154 (5th Cir. 1983). (Emphasis supplied.)

Some months before, the Fifth Circuit noted the limited scope of the trial court's discretion to deny prejudgment interest in *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983), a longshoreman's case. The Court reviewed the maritime law generally with respect to prejudgment interest awards, and stated:

> While we have said that the awarding of prejudgment interest lies within the discretion of the trial judge, we have also said that the *allowance of prejudgment interest in maritime law is the rule, rather than the exception.* "As a general rule, prejudgment interest *should be awarded* in admiralty cases—not as a penalty, but as compensation for the use of funds to which the claimant was rightfully entitled. Discretion to deny prejudgment interest is created only where there are 'peculiar circumstances' that would make it inequitable for the losing party to be forced to pay prejudgment interest." (Emphasis supplied.)

This same language is found in *Ceja v. Mike Hooks, Inc., supra.*

In other words, the award of prejudgment interest in a maritime case is the rule, rather than the exception, and while some cases state that the court has some discretion, and such discretion is extremely limited to situations where the court affirmatively finds that there are "peculiar circumstances" warranting a denial of prejudgment interest. Defendant has not proven any peculiar circumstances to deny the Plaintiff her right to prejudgment interest. The type of peculiar circumstance which has been allowed to deny prejudgment interest generally is where the plaintiff is responsible for the delay in the trial of the case. *See e.g. Socony Mobil Oil Co. v. Texas Coastal & Int'l, Inc.*, 559 F.2d 1008, 1014 (5th Cir. 1977). Ours is certainly not such a case because the Plaintiff diligently tried to get the case prepared for trial. Indeed, the only delay in getting the case to trial was the Defendant's failure and refusal to appear for deposition. None of the delay is chargeable to the Plaintiff.

The Plaintiff has done nothing to justify denying her right to prejudgment interest.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that her Motion for Judgment be granted, including her prayer for prejudgment interest at the rate of 8.67%, together with all further relief to which she is entitled.

Respectfully submitted,

O'QUINN & HAGANS

By: /s/ JOHN O'QUINN
John O'Quinn
TBA #15296000
3200 Texas Commerce Tower
600 Travis
Houston, Texas 77002
(713) 223-1000

Attorneys for Plaintiff

APPENDIX 14

Excerpts from Defendant's Motion for New Trial and/or to Modify Judgment

DEFENDANT'S MOTION FOR NEW TRIAL AND/OR TO MODIFY JUDGMENT. FILED: JULY 17, 1984. RAY HARDY, District Clerk, Harris County, Texas. By J. Lain, Deputy.

NO. 83-08655

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

IDA E. DOWNER

v.

AQUAMARINE OPERATORS, INC.

DEFENDANT'S MOTION FOR NEW TRIAL AND/OR TO MODIFY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, AQUAMARINE OPERATORS, INC., Defendant, and files this, its Motion for New Trial or, in the alternative, its Motion to Modify Judgment, and as grounds in support thereof respectfully asserts the following:

* * * *

E. THIS HONORABLE COURT'S EXCLUSION OF EVIDENCE OF THE PLAINTIFF'S DECEDENT'S COMPARATIVE NEGLIGENCE WAS CALCULATED TO CAUSE, AND PROBABLY DID CAUSE, THE RENDITION OF AN IMPROPER JUDGMENT.

As was explicitly pointed out to this Honorable Court, the law of admiralty has adopted a pure comparative negligence scheme which does not serve to bar any recovery sought by a Plaintiff, but merely reduces damages, or serves in mitigation thereof. To this end, Defendant submitted issues and instructions, refused by this Court, which were substantially and correctly worded, relating to findings on comparative negligence. Further, in view of this Court's concern that the jury would be tainted, Defendant also submitted a curing instruction, which was again refused by this Court.

The effect of this Court's refusal to allow Defendant to present evidence of the Plaintiff's decedent's comparative negligence denied Defendant an opportunity to point out to the jury all mitigating factors bearing on the issue of the Plaintiff's damages, and most certainly was calculated to cause, and probably did cause, the rendition of an improper judgment since the amount of damages awarded in this case was not properly off-set by the comparative negligence of the Plaintiff's decedent.

* * * *

G. THIS HONORABLE COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST ON THE JUDGMENT.

As previously pointed out to this Honorable Court, the Plaintiff in this case is not entitled to an award of pre-

judgment interest as a matter of law. Defendant cited longstanding authorities upon the settled point of law that this Court had absolutely no discretion to award pre-judgment interest in this case.

The law is absolutely crystal clear that in Jones Act cases tried at law, as opposed to those tried in admiralty wherein the admiralty rule of *restitutio in integrum* controls, an award of pre-judgment interest is not proper. The rationale, as set forth by the Court of Appeals for the Fifth Circuit, and by other courts having considered this question, is that when a Jones Act action is tried at law, the common law rule that pre-judgment interest is not awardable controls. However, when tried in admiralty, on the admiralty side of a Federal Court's docket, sitting without a jury, pursuant to Rule 9(h) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1333 under the admiralty and maritime law jurisdiction of a United States District Court, then, and only then, do the courts follow the admiralty rule of *restitutio in integrum*. Originally, this doctrine was only applied to property damage cases and has only recently, and with some reluctance, been extended to personal injury cases having nonpecuniary elements of loss. Several of the early actions for injury or death in which pre-judgment interest was allowed were cases involving the Death on the High Seas Act and death cases under the Jones Act, both of which allow only an award of pecuniary damages.

The law has made a clear and definite distinction between cases tried on the law side of a federal court's docket, to a jury, or in state court pursuant to the Savings to Suitor's Clause of the Judiciary Act of 1789, where an award of pre-judgment interest is improper and non-

discretionary, and cases tried in admiralty, where an award of pre-judgment interest is allowed subject to a court's discretion.

In her briefing in support of an award of prejudgment interest, Plaintiff only referred to cases tried in admiralty or pursuant to some other statute or Convention which allowed for an award of pre-judgment interest. *Plaintiff did not cite to this court a single case involving a Jones Act action tried at law where an award of pre-judgment interest was held to be proper.* The cases are clear that there is a distinction between actions tried at law and actions tried in admiralty and that the underlying rationale awarding pre-judgment interest in one instance, and the denial of an award of pre-judgment interest in another, is historically and practically well-founded.

Inasmuch as this Honorable Court had absolutely no discretion to award the Plaintiff pre-judgment interest, Defendant requests that this court modify the judgment to the extent required and disallow the previous award of pre-judgment interest.

* * * *

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Honorable Court in all things grant this, its Motion for New Trial. In the alternative, Defendant prays that this Honorable Court modify the Judgment heretofore entered in this cause by excluding the improper award of pre-judgment interest. Lastly, Defendant prays for such other and further relief both general and special, at law and in equity, to which it may show itself to be justly entitled.

* * * *

APPENDIX 15

Excerpts from Plaintiff's Response in Opposition to Defendant's Motion for New Trial and/or to Modify Judgment

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL AND/OR TO MODIFY JUDGMENT. FILED: JULY 30, 1984. RAY HARDY, District Clerk, Harris County, Texas. By M. Briones, Deputy.

NO. 83-08655

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

IDA E. DOWNER

v.

AQUAMARINE OPERATORS, INC.

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL AND/OR TO MODIFY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, IDA DOWNER, Plaintiff, in response to the Motion for New Trial and/or to Modify Judgment filed by Defendant, AQUAMARINE OPERATORS, INC., and in support of this Court's judgment rendered June 22, 1984, and in opposition to Defendant's Motion would respectfully show the Court as follows:

* * * *

III.

Exclusion of Evidence of Edward Downer's Alleged Negligence was Proper

The Court's refusal to allow the Defendant to present evidence of Edward Downer's alleged contributory negligence was proper for two independent reasons. First, the alleged defense is an impermissible defense under the law controlling this case. Second, Defendant was precluded from doing so as a discovery sanction.

As previously stated, the evidence which the Defendant wanted to introduce death with "assumption of the risk." However, under maritime law, including the Jones Act, this is impermissible. The maritime law has carved out the assumption of the risk as a form contributory negligence. Proof of assumption of risk is unpermissible.

In an ordinary trial, a maritime defendant is permitted to introduce defensive evidence of contributory negligence within the overall scheme of pure comparative fault. But this was not an ordinary trial. This was a trial on damages and punitive damages following an interlocutory discovery sanction default judgment. Defendant's excluded evidence goes to the defense, or "mitigation" of damages as it chooses to coin it, of contributory fault.

A defendant sanctioned by an interlocutory default judgment because of discovery abuse may be denied the opportunity to present his grounds of defense. *Brantley v. Etter*, 662 S.W.2d at 759; *Southern Pacific Transportation Co. v. Evans*, 519 S.W.2d 515 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd sure), *cert. denied*, 449 U.S. 994 (1980). Basically, the defendant is limited to the right to cross-examine the Plaintiff's witnesses and

interpose objections to testimony offered by those witnesses upon an inquiry into the amount of unliquidated damages. *Brantley v. Etter,* 662 S.W.2d at 759.

Even if the Defendant's purported contributory negligence proof were to have delved into something other than assumption of the risk, it would have been in an effort to reduce the degree of Defendant's culpability, not to repudiate the proof concerning Mrs. Downer's and the estate's gross amount of damages.

For example, under the discovery default judgment scheme, the Defendant might be entitled to try to show —as it was allowed to do in this case—that Mr. Downer didn't suffer loss of Mr. Downer's financial support in the amount of $Y, but rather $X less. This type of rebuttal is permitted in trials to determine the amount of unliquidated damages after a default judgment of any kind. But proof that the Plaintiff's decedent was X% negligent in order to attempt to reduce or even eliminate the ultimate degree liability goes to the very essence of what the default judgment determined in the first place. Conceivably, under different facts, another defendant might be able to prove that its plaintiff was 100% contributorily negligent and thus vitiate completely the sanctions of default! Defendant's type of argument is thus illogical and nothing more than a "back door" attempt to circumvent the consequences of discovery abuse.

* * * *

V.

Prejudgment Interest

The Court properly imposed prejudgment interest, and Defendant misstates the record when it says that Plaintiff's trial brief in support of prejudgment interest does not cite

"a single Jones Act action tried at law where an award of prejudgment interest was held to be proper." What Plaintiff did was to offer the Court cases which were tried similar to this one, i.e., cases in which the Jones Act or similar statutory action was combined with general maritime law and/or other negligence theory. *See e.g. Curry v. Fluor Drilling Services, Inc.*, 715 F.2d 893 (5th Cir. 1983) and *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191 (5th Cir. 1982), where prejudgment interest awards were sustained in actions in which Jones Act claims were joined with general maritime claims; *see also Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983), a Longshoreman and Harbor Worker's Act action tried under general maritime principles in which a prejudgment interest award was upheld. In these three cases, the prejudgment interest awards were upheld without distinguishing between the Jones Act and general maritime grounds of recovery.

* * * *

APPENDIX 16

Order overruling Defendant's Motion for New Trial and/or to Modify Judgment

ORDER OVERRULING DEFENDANT'S MOTION FOR NEW TRIAL AND/OR TO MODIFY JUDGMENT, SIGNED AUGUST 1, 1984. ENTERED: Volume 2808, Page 197, General Minutes, District Courts, in and for Harris County, Texas.

NO. 83-08655

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
334TH JUDICIAL DISTRICT

IDA E. DOWNER

v.

AQUAMARINE OPERATORS, INC.

O R D E R

On this 1st day of August, 1984, came to be heard the Motion for New Trial filed by Defendant, AQUAMARINE OPERATORS, INC., and after such being heard and considered by the Court, Defendant's Motion for New Trial is OVERRULED.

It is ORDERED, ADJUDGED and DECREED that Defendant's Motion for New Trial is OVERRULED.

Signed and entered this 1st day of August, 1984.

/s/ KEN HARRISON
Judge Presiding

APPROVED:

O'QUINN & HAGANS

By: /s/ FRANK M. STAGGS, JR.
(19003700)

John O'Quinn
SBOT #15296000

Michael Kerensky
SBOT #11331500

3200 Texas Commerce Tower
600 Travis
Houston, Texas 77002
(713) 223-1000

Attorneys for Plaintiff

APPENDIX 17

Excerpts from Appellant's Brief filed in the Court of Appeals

EXCERPT FROM APPELLANT'S BRIEF. FILED: October 29, 1984 in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston. MARY JANE SMART, Clerk.

* * * *

STATEMENT OF THE POINTS OF ERROR

POINT OF ERROR NO. 1

THE PRE-TRIAL COURT ERRED AS A MATTER OF LAW IN STRIKING APPELLANT'S ANSWER (TR.I-29).

POINT OF ERROR NO. 2

THE PRE-TRIAL COURT ABUSED ITS DISCRETION IN STRIKING APPELLANT'S ANSWER (TR. I-29).

POINT OF ERROR NO. 3

THE ALLEGATIONS CONTAINED IN APPELLEE'S FIRST AMENDED ORIGINAL PETITION ARE INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE JUDGMENT (TR.I-65; TR.II-257).

POINT OF ERROR NO. 4

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S CHALLENGE FOR CAUSE (S.F.I-37).

POINT OF ERROR NO. 5

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF THE DECEDENT'S CONTRIBUTORY NEGLIGENCE (S.F.III-46).

POINT OF ERROR NO. 6

THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST (TR.II-257).

* * * *

V.

ERROR IN AWARDING PREJUDGMENT INTEREST

POINT OF ERROR NO. 6

THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST (TR.II-257).

The proper disposition of point of error no. 6 is contingent upon a thorough understanding of the subtle rules contained in the federal precedents which address the propriety of an award of prejudgment interest in maritime matters.[1] Indeed, although these seemingly conflicting and often confusing subtleties have been unquestionably settled in a recent controlling Fifth Circuit opinion,[2] it is precisely such confusion which prompted

1. Federal law, rather than state law, governs the propriety of an award of prejudgment interest in maritime matters. *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54 (5th Cir. 1981). Indeed, as appellee pointed out in her brief in support of prejudgment interest, the "parties stipulated before trial that federal maritime law governs this case." (TR.II-222).

2. *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (5th Cir. 1984).

the trial court to erroneously award prejudgment interest at the insistence of the appellee.[3]

The preliminary inquiries for determining whether or not an award of prejudgment interest is appropriate are:

(1) Whether a claimant has sought recovery solely under the Jones Act,[4] solely under the general maritime law[5] *or* whether the claimant has joined both claims in a single action;[6] *and*

(2) Whether the claim or claims have been tried before a judge or to a jury.[7]

Only upon making this preliminary determination can the following relevant rules be correctly applied:

---

3. Appellee's Motion for Judgment (TR.II-156) requested, *inter alia*, an award of prejudgment interest on the 1.5 million dollar jury verdict. This request prompted various responses and briefs (TR.II-183,189,222,254) which magnify the subtleties and possible conflicts aforesaid, and culminated in the erroneous award of prejudgment interest on the verdict in the amount of $244,126.00. (TR.II-258).

4. As this Honorable Court is undoubtedly aware, the Jones Act is a congressionally created remedy available to a seaman for personal injury or wrongful death allegedly resulting from the negligence of his employer. 46 U.S.C. § 688.

5. A seaman's remedies under the general maritime law include, *inter alia*, a claim for "unseaworthiness" (i.e. breach of the shipowner's non-delegable duty, owed to its crewmembers, to provide a vessel which is reasonably fit for its intended use).

6. Frequently, as in the instant case (TR.I-2,18), Jones Act and unseaworthiness claims are joined in a single action and may be pursued in the federal or state courts as hereinafter described in footnote 7, at the claimant's option.

7. A Jones Act claim, joined with a general maritime law claim, may be brought as an admiralty claim in federal court (no jury available), as a law claim in federal court (jury election available) or, pursuant to the "savings to suitors" clause, 28 U.S.C. § 1333, it may be brought in state court (jury election available).

(1) Prejudgment interest is *not* recoverable when a Jones Act claim is tried to a jury. *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972); *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958, 972-73 (5th Cir. 1969).

(2) Prejudgment interest *is* recoverable when a general maritime law claim is tried to a judge. *See generally, Wyatt, supra,* at 956.

(3) An award of prejudgment interest is within the trial court's discretion when a Jones Act claim, joined with a general maritime law claim, is tried before a judge. *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191 (5th Cir. 1982).

(4) Prejudgment interest is *not* recoverable when a Jones Act claim, joined with a general maritime law claim, is tried to a jury *unless* a basis is provided "for determining which portion of the damage award, if any, is attributable to unseaworthiness rather than Jones Act negligence." *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951, 956 (5th Cir. 1984);[8] *also see Barton v. Zapata Offshore Co.*, 397 F. Supp. 778 (E.D. La. 1975), which is cited with complete approval and adopted in *Wyatt, supra,* at 956.[9]

---

8. As the Fifth Circuit noted in footnote 3 of the *Wyatt* opinion, at 955:

> A primary reason for this rule, especially in personal injury cases, is that a large component of the damage award generally is attributable to future lost wages and future medical expenses. Prejudgment interest is not necessary to compensate the plaintiff for losses which have not accrued at the time judgment is entered. *See Barrios*, 465 F.2d at 1168.

9. We pause momentarily to note that the *Barton* opinion was strenuously urged by appellant as controlling to the trial court (TR.

The case presently before this Honorable Court is governed by the fourth rule aforesaid and, consequently, the holding in *Wyatt, supra.* Appellee's first amended original petition alleges, *inter alia,* a negligence claim under the Jones Act and a claim for unseaworthiness under the general maritime law. (TR.I-2,18). The issue of damages was heard by a jury and special issues were answered. (TR.II-218,219). Here, as in *Wyatt, supra,* and *Barton, supra,* "the jury's answers to special [issues] did not reveal any basis for holding that some of the damages were in compensation for the admiralty [unseaworthiness] claim alone," rather than Jones Act negligence. *Wyatt, supra,* at 956. Consequently, the trial court erred in awarding prejudgment interest.

For the reasons set forth herein, appellant respectfully requests that this Honorable Court reverse the trial court's award of prejudgment interest and render judgment excluding the award of prejudgment interest. Tex. R. Civ. P. 434.

II-183,185,186,190), only to be referred to by appellee as "a district court decision that was neither reviewed nor approved by the Fifth Circuit." (TR.II-224). In light of *Wyatt, supra,* the inquiry is unquestionably settled.

APPENDIX 18

Excerpts from Reply Brief of Appellee filed in the Court of Appeals

EXCERPTS FROM REPLY BRIEF OF APPELLEE, IDA E. DOWNER. FILED: December 27, 1984 in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston. MARY JANE SMART, Clerk.

* * * *

A. NO PLEADINGS, NO EVIDENCE.

Contributory negligence or comparative negligence is an affirmative defense that must be pleaded. *McFadden v. Hale*, 615 S.W.2d 345, 348 (Tex. Civ. App.—Waco 1981, no writ). Defendant recognizes this to be so because it pleaded contributory negligence in its answer, which was stricken for its failure to do discovery. When Defendant offered the evidence in question, it had no answer or pleadings of contributory negligence. Thus, the evidence was properly excluded for this reason alone.

Defendant tries to avoid this problem by arguing that the evidence was offered in mitigation of damages. This is a distinction without a difference. Comparative negligence is a liability or fault issue and not a damage issue. *Cypress Creek Utility Services Co., Inc. v. Mullen*, 640 S.W.2d 860, 863 (Tex. 1982). It is a partial defense to recovery. Besides, Defendant had no "mitigation of damages" pleadings to support the admission of this evidence.

Moreover, the Court had, as a discovery sanction, found liability in favor of Plaintiff and ruled that only

damages would be tried. (TR. 64, 65); *Bass v. Duffey*, 620 S.W.2d at 850; TEX. R. CIV. P. 243. Defendant offered this evidence in an effort to sneak around that ruling.

Defendant, in effect, argues that liability is inextricably woven into the damage issue such that a court cannot grant a default judgment on liability alone. If this be true, then this part of our discovery sanction rules is rendered meaningless. Defendant failed and refused to do discovery concerning the conduct of the parties and for that reason the court determined that those aspects of the case would be deemed established in favor of the Plaintiff. If, as Defendant contends, the trial court nonetheless had to litigate the conduct of the parties in determining the damages, then the discovery sanction was an exercise in futility.

* * * *

REPLY POINT 6 (RESTATED)

[In Reply to Defendant's Point of Error No. 6]

THE TRIAL COURT PROPERLY RENDERED JUDGMENT AWARDING PREJUDGMENT INTEREST. ALSO, THE COMPLAINT IN QUESTION WAS WAIVED BECAUSE IT WAS NOT RAISED IN THE TRIAL COURT.

Defendant's last point of error asserts that prejudgment interest cannot be recovered because this case was tried to a jury. In the trial court, however, Defendant contended differently that prejudgment interest was not recoverable because Plaintiff had sued under the Jones Act as well as the general maritime law. (TR. 183-87, 268-69)

ARGUMENT AND AUTHORITIES

Federal law clearly allows the recovery of prejudgment interest in a wrongful death maritime case. *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191 (5th Cir. 1982).

In the trial court, Defendant made a kind of election of remedies argument that prejudgment interest is limited to general maritime cases tried on the "admiralty" side of the docket; that consequently it cannot be recovered under the Jones Act, which is an action "at law"; and that, therefore, Plaintiff somehow waived her right to prejudgment interest by joining a Jones Act cause of action with the general maritime cause of action.

This argument is not supported by federal case law, and for that reason, Defendant has abandoned it. Defendant's new argument is that Plaintiff cannot recover prejudgment interest because the case was tried to a jury, a new "election" argument that Plaintiff had to elect between her right to a jury trial and her right to prejudgment interest.

Defendant's new complaint should also be rejected not only because, by switching theories on appeal, Defendant waived the complaint, but also because this new complaint is legally incorrect.

A. WAIVER.

The fundamental rule of appellate procedure is that the appealing party cannot present on appeal a complaint that was not first presented to the trial court for decision. *Pirtle v. Gregory*, 629 S.W.2d at 920; *Gray-Taylor, Inc. v. Tennessee*, 587 S.W.2d at 671; *Willis v. Titan Contractors Corp.*, 625 S.W.2d at 74; *Love v. Olguin*, 572 S.W.2d at 19; *Fulcher v. Texas State Board*

of Public Accountancy, 571 S.W.2d at 370. To reverse the trial court, the appealing party must show that the theory of error in question was presented to the trial court for decision. *Id.* For example, a party cannot make one objection in the trial court to the admissibility of evidence and a different objection on appeal.

Defendant is seeking to advance a new complaint or theory of error regarding prejudgment interest. In the trial court, Defendant did not object to the award of prejudgment interest on the ground that the case had been tried to the jury. (TR. 183-87, 268-69) But rather, his only trial court objection to prejudgment interest was that the Plaintiff had sought to recover under the Jones Act as well as general maritime law. This new complaint was not properly preserved for appeal and therefore was waived. *Id.*

* * * *

APPENDIX 19

Excerpts from Motion for Rehearing filed in the Supreme Court of Texas

EXCERPTS FROM MOTION FOR REHEARING. FILED: DECEMBER 19, 1985 in the Supreme Court of Texas. MARY M. WAKEFIELD, Clerk.

STATEMENT OF THE POINTS OF ERROR

POINT OF ERROR NO. 1

THIS HONORABLE COURT ERRED IN REVERSING THE COURT OF APPEALS AS IT HAD NO JURISDICTION TO REVIEW THAT DECISION.

POINT OF ERROR NO. 2

THIS HONORABLE COURT ERRED IN REVERSING THE COURT OF APPEALS AS IT HAD NO JURISDICTION TO REVIEW DECISIONS BASED UPON ABUSE OF DISCRETION.

POINT OF ERROR NO. 3

THIS HONORABLE COURT ERRED IN REVERSING THE COURT OF APPEALS AS IT HAD NO JURISDICTION TO REVIEW THE SUFFICIENCY OF THE EVIDENCE CONCERNING THE "STATUS" OF THE PROSPECTIVE DEPONENTS.

POINT OF ERROR NO. 4

THIS HONORABLE COURT ERRED IN HOLDING THAT THE COURT OF APPEALS APPLIED AN IMPROPER STANDARD OF REVIEW.

POINT OF ERROR NO. 5

THIS HONORABLE COURT ERRED IN REVERSING THE COURT OF APPEALS JUDGMENT, WHICH IS CONCLUSIVE ON THE FACTS OF THIS CASE, AND CONSEQUENTLY IN AFFIRMING THE TRIAL COURTS ABUSE OF DISCRETION. (TR.I-29)

POINT OF ERROR NO. 6

THIS HONORABLE COURT ERRED IN CONCLUDING THAT RESPONDENT WAIVED THE SIXTH POINT OF ERROR PRESENTED TO THE COURT OF APPEALS.

POINT OF ERROR NO. 7

THIS HONORABLE COURT ERRED IN AFFIRMING THE TRIAL COURT'S AWARD OF PREJUDGMENT INTEREST. (TR.II-257)

POINT OF ERROR NO. 8

THIS HONORABLE COURT ERRED, THROUGH THE APPLICATION OF A STATE RULE OF PROCEDURE, IN DEPRIVING RESPONDENT'S ASSERTION OF A FEDERALLY CREATED SUBSTANTIVE RIGHT.

POINT OF ERROR NO. 9

THIS HONORABLE COURT ERRED IN AFFIRMING THE TRIAL COURT'S ERRONEOUS EXCLUSION OF EVIDENCE ADDRESSING THE DECEDENT'S CONTRIBUTORY NEGLIGENCE. (S.F.III-45,46)

APPENDIX 20

Letter from Supreme Court of Texas advising that Motion for Rehearing has been overruled

LETTER FROM SUPREME COURT OF TEXAS ADVISING THAT MOTION FOR REHEARING HAS BEEN OVERRULED. DATED: January 15, 1986.

SUPREME COURT OF TEXAS
P.O. Box. 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

January 15, 1986

Mr. John O'Quinn
O'Quinn & Hagans
3200 Texas Commerce Tower
600 Travis
Houston TX 77002

Mr. Frank M. Staggs, Jr.
O'Quinn & Hagans
3200 Texas Commerce Tower
600 Travis
Houston TX 77002

Mr. Terry P. Ayre
Cherry & Ayre
711 W. Bay Area Blvd.,
Suite 500
Webster TX 77598

Mr. Thomas A. Brown
Brown, Sims, Wise & White
2000 South Post Oak Blvd.
Suite 2300
Houston TX 77056

RE: Case No. C-4141

STYLE: IDA E. DOWNER
v. AQUAMARINE OPERATORS, INC.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

Mary M. Wakefield, Clerk

By: /s/ BLANCA E. MORIN
Deputy